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IN THE WAKE OF SPEEDY TERMINATION SETTLEMENTS

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"Persons attempting to find a motive in this narrative will be prosecuted; persons attempting to find a moral in it will be banished; persons attempting to find a plot in it will be shot.

By order of the author[s]

Per G. G., Chief of Ordnance"‡

THE Contract Settlement Act of 1944 was designed to insure speedy, fair, and final settlement of terminated war contracts.[1] Proponents of the legislation recognized that the streamlined settlement-by-negotiation procedure which it authorized would sacrifice meticulous accuracy to speed and on occasions leave loose ends temporarily unsettled. At this writing—two months after V-J Day and five months after V-E Day—there is almost universal concurrence that the standard settlement procedure prescribed under the act has attained the basic objectives of speed and fairness, and it is generally believed that finality of settlement likewise has been gained. A review of executed termination settlement agreements, however, indicates that their finality frequently is limited by reservations and exceptions to the mutual release of rights and obligations under the terminated contracts. Moreover, a termination settlement agreement is itself a contract that may embody unsettled rights and obligations which, in effect, merely replace those under the terminated contract. In this article it is proposed to analyze the nature and con-

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The opinions expressed in this article are those of the authors. They are not to be taken as representing War Department policy.

‡ Notice appearing on the fly page of Mark Twain's Huckleberry Finn.

[1] 58 Stat. 649, 41 U.S.C.A. § 101 (1944).

sequences of the more common of these loose ends—ends which may require considerable attention by both the contractor and the Government before their contractual relationship, in fact, is finally closed.

The observations contained in this article are based upon the experiences of one of the largest wartime procurement installations in the country, the Chicago Ordnance District. Approximately one-thirtieth of all Government war expenditures were made through this office. At the end of hostilities it was administering over 2,600 production contracts with over 1,000 prime contractors, involving more than 15,000 subcontractors. Previously, the District had negotiated the settlement of more than 2,300 terminated production contracts. In view of the size of its operations and the diversification in its procurements, there is reason to assume that the experiences of this contracting agency provide a representative cross-section of the workings of the national program for settlement of terminated war contracts.

On July 22, 1944, the Chicago Ordnance District closed the first major termination of the war program, settling a $217,000,000 terminated tank contract with the International Harvester Company. Under this contract there were 438 first tier subcontractors and over 3,000 other subcontractors, some removed by seven or eight tiers from the prime contractor. Although it required sixteen months from the date of termination to arrive at a settlement agreement, the intricacy of the contractual arrangements and the novelty of the problems had led many persons to believe that the maze would not be unraveled for two or three years. The case provided a testing ground for many termination procedures and resulted in the establishment of several major settlement policies. When Government officials announced to the newspapers that the case had been closed, they predicted that future settlement negotiations could be completed in ninety days, and this forecast in large measure has been fulfilled. Beyond all doubt, the experiment with the International Harvester Company was a success in demonstrating the effectiveness and potentialities of winding up terminated contracts through businesslike negotiations.

On the other hand, the Harvester tank termination is a noteworthy example of the loose ends with which this article is concerned. The settlement agreement of July 22, 1944, did provide the corporation with the full amount agreed upon as fair and reasonable compensation for its efforts under the contract, and in that sense the termination was then closed. However, certain substantial rights and obligations under the terminated contract were expressly reserved in the settlement, and even at this writing—fifteen months later—some of these have not been finally concluded.

A review of the files reveals that several vexatious claims of subcontractors were excepted from the original agreement, and although these subsequently were assumed by the Government for direct settlement, a few are still not closed. Also, the rights and liabilities of the parties with respect to the $10,480,000 of Government-owned facilities acquired under the contract were specifically left open in the settlement. The bulk of this equipment subsequently was transferred to a separate master facilities lease and a later production contract, but some even now remains subject to the terminated tank contract. To date, these facilities occupy much the same status as before the settlement agreement was signed.

At first impression these various loose ends may arouse concern, posing the question whether the settlement job is being slighted. Possibly a few cases will be found with shortcomings, but the vast majority of termination proceedings, including the Harvester case, have been conducted with thoroughness and efficiency. Certainly it is far better to have terminations settled with the speed and effectiveness of a well-knit business operation, rather than permit cumbersome and dilatory tactics to threaten our economic reconversion. Streamlined automobiles are not abandoned because they sometimes run over pedestrians; and speedy airplanes are not grounded because they occasionally collide with skyscrapers. Neither should termination settlements be wrapped in red tape because speed is accompanied by some deficiencies. But at the same time it would be ostrich-like to shut our eyes to such imperfections merely because the over-all policy is sound. It is believed that the following exploration of the causes and consequences of typical loose ends in settlements should help reduce to a minimum the shortcomings and aid in securing prompt disposition of open matters. This analysis, however, which focuses attention upon the relatively infrequent or more minor aspects of a huge enterprise, must not distort the broad perspective. By any standard, the national termination settlement program has been well conceived and successfully administered.[2]

STANDARD RESERVATIONS IN SETTLEMENTS

Termination settlements are normally consummated by the execution of a supplemental agreement to the terminated contract which provides that, upon the payment of an agreed amount to the contractor, "all rights and liabilities of the parties under the contract and under the [Con-

[2] See Fourth Report (War Contract Terminations and Settlements) by the Director of Contract Settlement to the Congress, July 1945.

tract Settlement] Act, in so far as it pertains to the contract, shall cease forthwith and be forever released," except for those items which are specifically reserved. A consideration of loose ends in termination settlements necessarily is concerned largely with the exceptions that follow this general release.

By far the largest number of such exceptions are the standard ones suggested by regulations for use in connection with the prescribed forms for settlement agreements. These standard reservations may be divided into two general classes. The first class consists of purely formal reservations of rights and obligations the parties have by virtue of statutes or executive orders, including, for example: (1) all rights of the Government to take the benefit of any adjustment under the Royalty Adjustment Act; and (2) all rights and liabilities of the parties under the Contract Settlement Act relating to removal and storage of termination inventory. In reality, these formal reservations may be superfluous inasmuch as the general release does not purport to cover these non-contractual rights and liabilities and, moreover, it is doubtful whether the parties are capable of contracting away the operation of statutes and executive orders. However, certain laws and orders commence operating as a result of a contractual relationship between the parties. The formal reservations serve to prevent contractors from erroneously assuming that termination of the contractual relationship also terminates operation of allied statutes and executive orders.

The second class of standard reservations pertains to various contractual rights and obligations which, because of their very nature, were intended by the parties to remain executory long after other phases of the contract are completed. Termination of a contract, in itself, does not alter the nature of rights and obligations such as those: (1) arising under the contract articles which relate to reproduction rights, patent infringements, inventions, and application for patents; (2) concerning the Government's contractual right to take the benefit of agreements reducing or otherwise affecting royalties paid or payable in connection with performance of the contract; (3) applicable to options, covenants not to compete, and covenants of indemnity; or (4) concerning defects in, and guarantees or warranties relating to, any completed articles or component parts furnished to the Government by the contractor pursuant to the contract. These rights and obligations are peculiar in that the facts upon which they operate might not come into existence or be uncovered until the lapse of considerable time. Nothing that can be done by the parties in settling a terminated contract will alter this condition, and so it has become stand-

ard practice to except such rights and obligations from settlement agreements.[3]

None of these standard reservations, however, should be considered a loose end of termination settlements. All of them are the usual strands dangling after Government contracts, and are in no sense an indication that a termination settlement is incomplete.[4] For this reason they need not be discussed at length.

TREATMENT OF GOVERNMENT-OWNED FACILITIES IN SETTLEMENTS

Of all the matters left open in any substantial number of executed termination settlement agreements, perhaps the most mysterious, and certainly the most misunderstood, are rights and obligations concerning Government-owned facilities used by contractors in performing their production contracts. A general impression of the dollar-wise importance of these facilities may be gained from statistics compiled from records of the Chicago Ordnance District. On V-E Day, contractors of the District held approximately 30,000 pieces of Government-owned basic equipment, having an estimated cost of $180,000,000. Most of the machines were equipped with accessories and attachments, including hand tools for operation and maintenance of the basic units. Random samplings of the property accounts indicate that there were at least four such minor items for each major piece of equipment. A large number of contractors in addition possessed Government facilities in the form of materials and fixtures incorporated into their plants to enable installation of equipment.[5] Under

[3] Arrangements may be made for eliminating some of the standard reservations. For example, a settlement agreement may provide for the release of a contractor's warranty obligations. See Joint Termination Regulation (8-10-45) para. 742.3, 742.4, 981.1 and 983.1. Contracting agencies have been instructed that before releasing such warranty liability they should determine that the Government is receiving what is deemed to be adequate consideration for the release. See Ordnance Procurement Instructions (10-1-45) para. 15,763.

[4] At least one contractor has strongly objected to the use of standard reservations in settlement agreements. In returning a boilerplate settlement agreement "as being not in proper form," the contractor complained:

"This [agreement] covers from our standpoint complete cancellation at no cost to the Government for complete units none of which and no part of which have been delivered. Therefore the termination must be without any exceptions and those which you have interposed are irrelevant, immaterial and do not constitute cancellation.

"We desire to dispose of the matter and close our file and not be subject to further expenses by unnecessary further checking, snooping, demands for silly reports etc. etc. etc. etc. We are trying to save the Government money but have no desire to be compelled to spend of our own to satisfy we don't know what [sic]."

[5] In an opinion rendered on June 16, 1945, the Director of Materiel, Headquarters, Army Service Forces (War Department) ruled that the Government does not have title to a large portion of the installation materials for which the Government had directly or indirectly reimbursed its contractors. This decision, embodied in a first indorsement to the Chief of Ordnance,

some contracts the installed Government facilities even comprised plant improvements and additions designed to habilitate the contractors' premises for war production. While the more common facilities provisions in contracts were changed several times during the war, in general all obligated contractors to return the various classes of facilities and, with certain minor exceptions, to maintain them in good repair and operating condition.[6] These obligations, and the corresponding rights of the Gov-

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provided in part as follows: "It is the opinion of this office that the proper interpretation of [Procurement Regulations] is that title to installation materials not identifiably listed on [contracts] is not intended to be and is not vested in the Government by virtue of the facilities article, notwithstanding the fact that the Government may have borne the cost of such materials, directly through reimbursement of the cost or lump sum payment of installation cost or indirectly through the contract price. . . . . It is important to note, however, that although as indicated above, title to the installation materials is not in the Government merely because the Government bore the cost of the installation of the facilities, the fact that facilities are installed is very material in determining their value for purposes of sale to the contractor in possession." See Ordnance Procurement Circular 137–45, June 16, 1945.

[6] Most facilities articles in Chicago Ordnance District contracts contain one of two pairs of liability clauses. The first pair listed below was used earlier in the procurement program:

(1) "The contractor agrees at its own expense to keep the facilities in good operating condition and repair and to make repairs and replacements to the extent that the necessity for such repairs is due to wear and tear resulting from operational activity.

"The contractor shall not be liable for loss or destruction of or damage to the facilities unless such loss, damage, or destruction results from failure to perform the duty imposed by the preceding clause or from wilful misconduct or failure to exercise good faith on the part of the contractor's corporate officers or other representatives having supervision or direction of the operations of the whole of the contractor's business or of the whole of any plant operated by the contractor in performance of this contract.

(2) "The contractor shall not be liable for loss or destruction of or damage to facilities title to which has vested in the Government (a) caused by any peril while the facilities are in transit off the contractor's premises, or (b) caused by any of the following perils while the facilities are on the contractor's or subcontractor's or other premises or by removal therefrom because of any of the following perils:

Fire; lightning; windstorm, cyclone, tornado, hail; explosion; riot, riot attending a strike, civil commotion; vandalism and malicious mischief; aircraft or objects falling therefrom; vehicles running on land or tracts, excluding vehicles owned or operated by the contractor or any agent or employee of the contractor; smoke; sprinkler leakage, earthquake or volcanic eruption; flood, meaning thereby rising of rivers or streams; enemy attack or any action taken by the military, naval or air forces of the United States in resisting enemy attack.

"Except to the extent of any loss or destruction of or damage to facilities for which the contractor is relieved of liability under the foregoing provisions of this paragraph, and except for reasonable wear and tear or depreciation, the facilities (other than facilities permitted to be sold) shall be returned by the contractor to the Government, or delivered by the contractor to any designee of the Government (at the time elsewhere in this article provided) in as good condition as when received by the contractor in connection with this contract. In aid of its obligation so to return the facilities, the contractor shall, at its own expense, maintain a program for the proper use, care and maintenance of the facilities, as well as a property control and accounting system consistent with good business practice, and make repairs and replacements."

ernment, form the core of "facilities questions" in termination settlements.[7]

To appreciate the scope and nature of facilities questions which may arise in connection with settling a terminated production contract, the relationship between termination settlements and loss or damage of Government-owned facilities needs to be explored. This relationship in essence rests upon the contractual alliance, if any, between the terminated contract which is being settled and the facilities which have been lost or damaged. Where facilities are held by the contractor under the provisions of a production contract which is terminated, either rights and obligations pertaining to such facilities must be concluded in the termination settlement, or the contract has to be kept open in order later to resolve facilities questions. In this sense, final disposition of rights and obligations as to facilities controlled by a terminated contract constitutes a necessary part of a full settlement of that contract. Even though resolution of facilities questions does not go to the heart of a termination settlement—which consists of compensating the contractor for cancellation of his contract—the terminated contract cannot be finally closed until rights and obligations concerning such facilities have been settled. In effect, a termination settlement which excludes relevant facilities questions is comparable to a contract which has run to completion but on which the parties have not as yet adjusted rights and liabilities in respect of facilities leased under the contract. In both situations the contractor has performed his obligations as to production and delivery of supplies, the Government has reimbursed the contractor for his work, but the facilities portion of the contract remains executory.

The facilities used by contractors in performing production contracts frequently are not held under the provisions of those contracts. Where such production contracts are terminated they may be settled in full and closed without resolving questions as to the facilities. These fundamentally different relationships may be made clear through a summary of three common arrangements under which facilities are held by contractors:

1. Facilities were acquired and are used by the contractor under the terms of a production contract. Rights and obligations as to these facilities are controlled by the production contract—and the contract may not be completely closed, even after termi-

[7] Another group of facilities questions which have arisen in connection with terminations concern reimbursement by the Government to the contractor for the cost of acquiring or manufacturing facilities for Government account. These questions normally are resolved by an audit and seldom are controversial. Few difficulties arise in lumping reimbursement for facilities into the negotiated termination settlement, and the Chicago Ordnance District generally has followed that practice since it was authorized by regulations. In this article reimbursement problems will not be treated as "facilities questions."

nation, until such rights and obligations have been settled. At V-E Day about 9,000 of the major facilities in the Chicago Ordnance District were held by contractors on this basis.

2. Facilities were acquired by the contractor under an earlier production contract, which was either completed or terminated, and thereafter the contractor is authorized by a later production contract to continue using the facilities. In this situation, loss or damage of facilities while they are used under the later contract may be controlled by it, and, if so, full settlement of that contract upon termination must include resolution of these matters. Adjustment for loss or damage occurring under the earlier contract, as will be explained subsequently, likewise may be a necessary element of settling the later contract in full. It is estimated that on V-E Day some 7,000 major pieces of Chicago Ordnance District equipment were employed on production contracts authorizing use of facilities which had been acquired by contractors under earlier production contracts.

3. Facilities are held by the contractor under a lease which is independent of all production contracts. Here, facilities questions are to be resolved under the provisions of the lease. Where the lease is terminated and all the leased facilities were used on production contracts with a single contracting agency (which also represents the Government on the lease), it might be advisable for convenience to combine negotiations for the settlement of the terminated lease and any terminated production contracts on which the facilities were employed. Even where this is done, however, questions as to facilities under the lease are not affected by terms of the terminated production contracts, and such contracts may be settled in full without consideration of questions respecting facilities on the lease. About 14,000 major facilities of the Chicago Ordnance District were held by contractors under separate leases on V-E Day.

Inasmuch as disposition of facilities questions necessarily entails an inventory and inspection of the facilities, it is easy to understand why prior to cessation of a major portion of hostilities many contracting agencies frequently excepted facilities questions from termination settlements. After termination of a production contract under which facilities were held, the contractor in most instances would be kept in the procurement program and authorized to use the facilities on another production contract or under a facilities lease. To have settled all existing facilities questions would have meant undertaking an otherwise unnecessary inventory and inspection of the facilities at a time when manpower was vitally needed for production of supplies. Contractors as well as contracting agencies desired to avoid disrupting production and diverting skilled labor, with the result that facilities questions by mutual consent were excepted from termination settlement agreements. This lack of finality as to facilities seemed logical where the Government permitted the contractor to continue using the facilities. At best, the parties could have settled only for loss or damage which had occurred prior to the time the facilities were transferred from the jurisdiction of one document to another.

Another phase of this use of facilities on successive and several con-

tracts was the program of contracting agencies to transfer control of facilities from production contracts to master facilities leases. When facilities acquired under certain production contracts became necessary for the performance of other contracts with the same contractor, the Government found that administration of its facilities could be improved through bringing together under a single master lease most or all facilities in the possession of the contractor. Among other reasons, this consolidation was designed to reduce the number of governing instruments, standardize and equalize the terms under which facilities were held, and simplify spreading the use of facilities over a number of production contracts. The contracting agencies conducted an extensive campaign to sell contractors on the scheme, with the result in the Chicago Ordnance District that on V-E Day about 45 per cent of all major facilities were under master facilities leases. For reasons already noted, no inventory or inspection of facilities was accomplished at the time of their transfer from production contracts to facilities leases, and so the parties were not in a position to settle the facilities questions which might have arisen under the production contracts. In effect, the change-over of facilities to master leases merely postponed en masse the resolution of facilities questions—a consequence of continuing use of the facilities.

Even so, as matters have worked out in practice apparently there are no facilities questions to be resolved under the production contracts from which facilities were transferred, without inventory or inspection, to subsequent production contracts and master leases. In theory, under the terms of some older production contracts, it could be argued that loss and damage of facilities occurring prior to such transfer would be subject only to the provisions of the production contracts under which the facilities were then being employed.[8] Actually there seldom is available data upon which to determine the precise or even approximate date of loss or damage; consequently apportioning discrepancies among consecutive contracts becomes almost impossible. Because the measure of the contractor's obligations and liabilities usually remains unchanged as facilities pass from the control of one contract to another, the contractor is unlikely to object to treating all discrepancies as having occurred under the last controlling contract. Furthermore, under the facilities clauses in more recent production contracts, the contractor's liability for loss or damage of facilities probably does not mature until the time he is required to re-

[8] In this connection refer to the first pair of liability clauses set out in note 6 supra. Under these clauses it might be urged that the contractor's liability matured as of the time he failed to follow a sound maintenance program and that such liability would be enforceable only under the contract on which the facilities were held at the time of this failure.

turn the facilities, so that authorization in a subsequent contract for continued use of the facilities would preclude liability for loss or damage from accruing under the previous instrument.[9] Although the contractual transfer of facilities without an inventory and inspection postpones settling facilities questions, this practice only nominally keeps open these questions under the earlier contracts. For this reason, the omission to resolve facilities questions in termination settlements with contractors remaining in the production program was, in most instances, a matter of little significance.

While prior to V-E Day there were relatively few contractors holding Government-owned facilities who dropped out of the war procurement program upon termination of particular production contracts, the situation thereafter was reversed. After V-J Day almost all Government-owned facilities became idle.[10] It might be expected that the settlements of later-date terminations would wind up all facilities questions arising under terminated production contracts.[11] But the fact is that complete finality with respect to facilities has not always been achieved in termination settlements.

Contractors going out of the war program often have desired to reserve disposition of facilities questions in order to speed the execution of termination settlement agreements. Realizing that settlement of facilities questions arising under terminated contracts must rest upon inventories and inspections by Government representatives, and being informed that normally these are not undertaken until actual removal of facilities, contractors have preferred closing termination settlements by excepting all facilities questions. In other words, loose ends may result from a desire for speedy settlements and from a general appreciation of the fact that clearance of facilities from plants might not keep abreast of termination negotiations. Moreover, in many cases contractors probably feel that, since they

[9] See the second pair of liability clauses contained in note 6 above. The most likely construction of these provisions is that the contractor's obligations for care and maintenance are tied in with his obligation to *return* the facilities at the proper time.

[10] At the end of the war with Japan, about 230 contractors of the Chicago Ordnance District held Government facilities subject to the terms of production contracts.

[11] The authority to include resolution of facilities questions in a termination settlement is clearly set out in Joint Termination Regulation (8-10-45) para. 868(1): "If a facilities contract is included in a supply, construction or other contract which has been terminated in whole or in part, or if a separate facilities contract has been terminated in whole or in part, the liability of the war contractor for loss of and damage to plant equipment furnished to or acquired by the war contractor under the facilities contract may be settled by negotiation in and as a part of any negotiated settlement of such terminated contract. Where not settled by agreement, it may be settled in accordance with the provisions of the contract, using the procedures for a formula settlement under a fixed-price supply contract insofar as applicable."

acted in good faith in caring for Government-owned property, the reservation of facilities questions is merely a formality. Some of these very contractors are considerably surprised to learn later that, despite their good intentions, the Government treats them as liable for the value of missing facilities. Apparently these contractors forgot, or never knew, that the resolution of facilities questions not foreclosed in a negotiated termination settlement is subject to the scrutiny of a strict accounting and property audit.[12]

Two groups of Government personnel also have had reasons for excepting facilities questions from termination settlements. The first consists of termination negotiators who have been motivated by the same desire for speed as contractors in order to meet schedules set up for settlements. These work standards, and the reports predicated upon them, are a necessary and highly effective means of gauging and controlling the progress of many thousands of individuals constituting the Government termination team. In order to have a common denominator and realistic basis for charting this progress, the control system has used as its basic unit of measure the full payment of prime contractors' termination charges. Reservations in settlements which do not preclude such full payment are not in conflict with the main goal of the national program and are divorced from the basic measurement of accomplishments. Reflecting the need for performing "first things first," negotiators have had to concentrate on concluding settlements which would result in compensating prime contractors in full. Where facilities questions, being of secondary importance, interfered with the main goal, negotiators have been willing to reserve them for future disposition.

The second group which, until recently, shared the negotiators' attitude consisted of the individuals designated as responsible for maintaining Government-property accounts. The position long taken by the property officers can be explained best by an example. Suppose that through an inventory and inspection the contractor properly accounted for the condition and existence of all facilities listed on the property records, and that the termination settlement agreement contained a mutual release of all rights and obligations as to facilities held under the terminated contract. If the property officer used that release as a blanket credit to his account, what would happen if later it were discovered that a certain facility

[12] A general impression of the number of cases involving lost or damaged facilities may be gained from figures compiled from Chicago Ordnance District records. During July 1945, cases were closed with fifteen contractors. In eleven of these cases the contractors were held liable. During the following month, August, 1945, twenty-four cases were completed. Contractors were held liable in three of them.

through error initially had been omitted from the account and in fact never had been returned by the contractor?[13] Remembering the possibility of their being liable for property not accounted for, property officers continued to request reservation of facilities questions from termination settlement agreements until assured that a mutual release of rights and obligations as to all facilities would adequately protect them where accounts were in error. Not until after V-J Day were property officers entirely satisfied as to their position under such a mutual release.[14]

Though contractors and Government personnel avoided consideration of facilities questions in termination settlements, at times both groups recognized that mere reservation of facilities questions was unsatisfactory for reasons other than lack of completeness and finality. The facilities provisions in production contracts generally were drafted with primary attention being given to acquisition and use of facilities, while arrangements for their maintenance and storage by the contractor after ceasing production were not spelled out in practical detail. If extensive storage or standby were likely, rather than only reserve facilities questions in a termination settlement, the parties sometimes preferred to enter into a separate maintenance or storage agreement covering the facilities. Obviously, this procedure could not conclusively settle all rights and obligations as to facilities. Moreover, since an inventory and inspection of facilities usually was not desired at the time of their transfer to a storage agreement, the parties almost always reserved facilities questions under the terminated production contract so as to leave open a means of later

[13] A similar set of circumstances actually developed in one case in which the Chicago Ordnance District closed all facilities questions in a negotiated termination settlement. The missing machine had been moved into the plant of a subcontractor and at the time of settlement was listed on the wrong property account. Even though, as noted later in the text, the property officer now is protected in this situation, it seems questionable whether the Government gave up title to the machine by way of the release in the settlement agreement. The usual release states that all rights and liabilities under the terminated contract cease, except as otherwise specifically provided. It could be argued that such a release ends the contractor's obligation to return the once missing machine. On the other hand, it might be urged that the release does not contain words of conveyance and therefore cannot operate to pass title. That is, rights and liabilities under the contract may have ended, but the Government's title in the machine is not founded on the terminated contract; even after execution of the release, the Government would have its common law remedies to recover the machine.

[14] At this writing it seems likely that in the immediate future an important reason for not concluding facilities questions in termination settlements will be that settlements will outstrip the speed with which plants are cleared of facilities. This prediction is based on the time goals established by the Chicago Ordnance District. It appears that the goals for closing termination settlements require that a large number of settlements be completed prior to clearance of the plants involved. This means, of course, that all facilities questions cannot be disposed of in such termination settlements unless the facilities remaining in the plants after settlement are placed under interim storage agreements.

settling for loss of and damage to facilities occurring prior to execution of the storage agreement. Chicago Ordnance District records indicate that in only one case of transferring facilities from a production contract to a storage agreement were rights and obligations as to facilities under the production contract released—and that arrangement was completed before the production contract was terminated.

To this point, the discussion of Government-owned facilities has been directed mainly at explaining why, in practice, facilities questions often have been reserved in termination settlements. The fact that such reservations have been common, however, apart from historical aspects, is of real significance only in view of the consequences attendant upon making these reservations. In analyzing the consequences, sight must not be lost of the consideration that virtually all termination settlements have been negotiated settlements. In short, the parties arrange for settlement through a businesslike process of give and take, which produces an overall "deal" acceptable as fair and equitable to both parties.

Reserving facilities questions from a termination settlement automatically results in excluding these questions from the give and take leading to the settlement agreement. This effect alone might be unimportant, but it almost invariably is accompanied by the situation that all liabilities in respect of facilities run exclusively from the contractor to the Government. That is, facilities questions practically always concern shortages and damages in facilities, and liability for such discrepancies in Government-owned property can only be against the contractor and in favor of the Government.[15] On the other hand, a termination settlement chiefly is concerned with discharging the Government's liability to the contractor arising from cancellation of the contract. The exclusion of facilities questions from a termination settlement therefore means eliminating from the businesslike exchanges of settlement negotiations a potential liability of the contractor, and postponing consideration of it to a time when the contractor is making no claim against the Government.[16]

Negotiation of facilities questions at such a later date sometimes becomes extremely difficult to conduct, for the area of give and take is

[15] See note 7, supra. In a few cases the reservation of *all* facilities questions from a termination settlement might leave certain sums owed by the Government to the contractor as reimbursement for acquisition or manufacture of facilities. However, such reimbursement generally is calculated on an audit basis, so that the area for negotiation is very limited.

[16] If the contracting agency is slow in removing facilities from a contractor's plant, the contractor may be in a position to assert a claim for the expense entailed in retaining the facilities. Most facilities articles and master facilities leases provide in effect that the contractor shall retain facilities in a stand-by condition at his own expense for 90 days after they become idle and available; thereafter, the burden may be shifted to the Government.

limited to a narrow path running in but one direction. Reduced to basic elements, the situation ordinarily consists of a claim by the Government for the value of missing or damaged facilities and possible resistance to the claim on the part of the contractor. The Government representatives are under an obligation to attempt to collect payment for the value, while the contractor may well feel that his breach should be overlooked in view of his good war production record. Since the termination settlement is long past, the contractor might adopt the attitude that liability for discrepancies in facilities should be forgotten. Thus, the task of enforcing a contractor's liability is apt to be unpleasant, and with war procurement over (and no further contracts forthcoming), the resistance of contractors can be expected to increase.[17] Both contractors and the Government wish to avoid future time-consuming and irritating negotiations of this nature. Were facilities questions treated as but one factor among many in the termination settlement, in all probability a fair and equitable disposition of a contractor's liability could be reached without much bickering. This is especially true inasmuch as a contractor's liability in respect of facilities normally is small in comparison to the total amount of the termination settlement.

The negotiator's report on the facilities aspect of a termination administered by the Chicago Ordnance District persuasively illustrates the advisability of a complete settlement—particularly in regard to protecting the interests of the Government. In explaining the treatment of lost and damaged facilities in the over-all deal, which involved a gross settlement of $876,886.10 and a net settlement of $116,022.77 for the termination of a contract to produce carbines, the negotiator stated:

> Because of the protracted negotiations with the contractor and the difficulties in connection with its administration and settlement, it was decided to settle at the time of the termination all questions in connection with Government-owned as well as contractor-owned property. The agreement was made that to the extent Government-owned equipment of any kind could not be accounted for the amount of the settlement would be reduced, the amount of the reduction to be determined by an appraisal of the fair current value of the equipment missing. At the time of final settlement the property records of the District had been reduced to a zero balance with the exception of

[17] During the war procurement program, there were relatively few cases in the Chicago Ordnance District in which the parties could not readily agree upon the contractor's liability for lost or damaged facilities. In most instances contractors recognized the advisability of accepting findings of the agency in order to avoid disputes. There is evidence at this writing, however, that with war procurement activity ended, some contractors are fighting hard to keep every dollar. In this connection note the prediction of two former members of the Chicago Ordnance District that, as to a contractor's obligations respecting Government facilities, "enforcement will be a difficult problem." Fain and Watt, War Procurement—A New Pattern in Contracts, 44 Col. L. Rev. 127, 139 (1944).

property having a fair current value of $32,700. The settlement was reduced in this amount in consideration of the elimination of further liability on the part of the contractor for such missing property. In making this reduction it was considered that the amount thereof would adequately cover the contingency of losses arising or being made known to the government subsequent to the date the settlement agreement was signed. Further reduction was made in the sum of $1,367.48 reflecting recovery by the government of loss through damage to Government-owned facilities. In view of this arrangement, the termination supplement does not except from the settlement the provisions of the Government-owned facilities article as all rights and liabilities of the parties under the provisions of this article are settled by the termination agreement.

The disadvantageous position of the Government resulting from not considering facilities in termination settlement negotiations also has a direct bearing upon the ultimate treatment and disposition of Government-owned facilities in the form of installation materials and plant improvements and additions. Usually these built-in facilities have little sale value after removal from the contractor's plant, and frequently the cost of removal exceeds the anticipated proceeds from a later sale. Where removal is uneconomical, and the facilities are of no substantial value to the contractor in possession and will not interfere with his commercial production, arrangements generally can be made to abandon the facilities in place.[18] However, where not-readily-severable facilities are of substantial value to the contractor in possession, abandonment would confer a windfall on him. Regulations prohibit this course,[19] but they also appear to preclude in many cases removing the facilities at a net loss to the Government.[20] The dilemma seemingly can be solved only by arranging a sale of these facilities to the contractor in possession.

[18] Joint Termination Regulation (8–10–45) para. 864.4 provides: "(1) The contracting officer may discard or abandon items of plant equipment when he determines that they are worthless. . . . . (2) Plant equipment which is not readily severable from the war contractor's plant and which has no substantial value to the war contractor may be considered worthless if the estimated cost of dismantling, removal and sale of such plant equipment (including the cost of repairing any damage done to the war contractor's plant to the extent that the Government may be liable therefor) exceeds the estimated net return to the Government upon sale of such plant equipment when dismantled and removed."

[19] Surplus Property Board Regulation No. 6 para. 5(d) provides: "Sales of all plant equipment, not readily severable, shall be made at the fair value thereof. Fair value shall be determined by the owning agency (employing appraisers to the extent deemed necessary or desirable), and, in order to prevent windfalls, primary consideration shall be given to the value of the plant equipment to the owner of the premises for the purpose for which it is to be used."

[20] Joint Termination Regulation (8–10–45) para. 861.1 (4) provides: "The War Department will permit the severance of plant equipment, which is not readily severable, only if the contracting officer shall have given prior written authorization therefor. Such authorization shall be given if such plant equipment is required for redistribution for war production or in the interests of national defense. Such authorization may be given if (a) the estimated net proceeds to the Government from the plant equipment when severed will substantially exceed the estimated cost to the Government of the severance and removal, including the cost of repairing

In arriving at the sale price of not-readily-severable facilities, the Surplus Property Board has directed that primary consideration be given to the value of the facilities to the purchasing contractor.[21] This eminently fair principle is frequently difficult of application because a hard-bargaining contractor is well aware that the alternatives to sale on his terms are abandonment or removal at a loss. Often the Government's best possibility of securing a reasonable return on its facilities is sale to the possessor while he has (or might have) claims against the Government which will be settled by negotiation. This means arranging a sale either while the contract governing the facilities is still being performed or during negotiations following its termination. After completion of the contract or settlement for its termination, the Government will be without compensating leverage in negotiating the sale of built-in facilities.

The Government's bargaining position in selling not-readily-severable facilities is of greater than usual significance. Government-owned plant improvements and additions, especially under cost-plus-a-fixed-fee contracts, frequently are relatively expensive, and their value to the contractor in possession is open to widely varying opinions. In some cases the private plant habilitated at Government expense had been idle for years prior to the war procurement program, and the contractor might insist that it will again be closed down. Under these circumstances, the contractor may refuse to recognize that the improvements and additions enhance the value of his plant. From the Government's viewpoint, however, the contractor has received a potential benefit at least to the extent that the sale value of the habilitated plant has increased. In reply the contractor may say that he does not intend to sell, and furthermore, the market for such plants is unpredictable—particularly since the Government is currently disposing of surplus plants which are only a few years old. In these and similar situations it must be admitted that the value of facilities to the contractor cannot be measured in advance by any commonly accepted standards. The parties conceivably could postpone fixing a sale price for a certain period in order to secure more enlightening facts as to value, but neither contracting agencies nor contractors have been inclined to indorse creation of such contingent liabilities. Likewise, con-

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any damage to the war contractor's plant to the extent that the Government may be liable therefor . . . . or (b) the war contractor in possession has requested such authorization and the plant equipment is of such a nature or is so attached to or embodied in the war contractor's plant, that the Government's failure to remove it will materially interfere with his other war production or reconversion to civilian production."

[21] See note 19, supra.

tractors consistently have refused to purchase at a price subsequently to be established by a third party arbiter. Immediate negotiation of price apparently is the only mutually satisfactory method of consummating sale, and with value being largely a matter of opinion, bargaining position often is the critical element in arriving at the sale price.

In selling not-readily-severable facilities to contractors in possession, there is an exceptionally strong reason for contracting agencies to insure receipt of a fair price. Where a contractor obtains an overly liberal settlement of his termination claim, the Government can expect to recoup a substantial portion of the contractor's "excess" profit through renegotiation and taxes. These safeguards are not present where the contractor's windfall is in the form of facilities acquired at prices far below cost. Such an acquisition does not involve "income" or "profit," and the facilities need be capitalized merely at the contractor's purchase price. This consideration may lead contractors to drive hard bargains in obtaining built-in facilities from the Government. But even though enhancement in plant value over and above the price paid for Government habilitation is technically not a renegotiable or taxable profit, it may represent a real gain to the contractor. Contracting agencies have a compelling obligation to guard against conferring such hidden gains which escape public scrutiny.

In this connection contracting agencies have had to recognize that an acquisition appearing on the surface to bestow a windfall on the contractor might actually turn out to be of small value to him. Many plant improvements for war purposes are in excess of contractors' normal requirements. If a contractor should attempt to cash in through sale of excess plant capacity acquired from the Government at low prices, he would have an equally low base for the computation of any capital gain realized on the transaction. If he retains the assets, which in many cases are not designed for, or particularly adapted to, peacetime production, expensive alterations may be required before the improved plant can be efficiently put to postwar use. In addition, future depreciation would be allowable only upon the basis of the low acquisition cost.

It should also be observed that contractors who undertook plant improvements and habilitation *at their own expense* under certificates of necessity might have received even larger gains than contractors who obtain Government facilities at what appear to be bargain prices. The shortening of the amortization period from sixty months to the span of time between "acquisition date" and September 30, 1945,[22] has had the effect of permitting certificate holders to acquire improvements and habilitation

[22] Presidential Proclamation 2669, 10 Fed. Reg. 12475, Oct. 4, 1945.

(or even new plants) fully paid for through wartime production. Granted, certificate holders had to advance the funds for making capital improvements, while the Government advanced the money for improvements to which it reserved title. But considering that the certificate holder added the cost of built-in facilities to his other production costs, and therefore received a profit on the advance, it appears that the certificate holder usually obtained a better deal than the contractor in possession who purchased Government-owned facilities at a nominal price. This comparison is all the more pointed since the monetary risk factor proved to be almost negligible in both cases. Even so, the good fortunes of certificate holders cannot excuse contracting agencies from their duty to secure fair values on sales of built-in facilities.

Having shown the need for placing the Government in a strong bargaining position in selling not-readily-severable facilities to contractors in possession, a few case histories will illustrate the types of deals which can be arranged by combining the conveyance of built-in facilities with a negotiated termination settlement of the contract under which the facilities were acquired.

Case One involved the settlement of a terminated $465,650,000 cost-plus-a-fixed-fee contract to produce tanks and spare parts. The contractor's plant, which previously had not been used for many years and was in a decaying condition, was rehabilitated with Government funds at an expense of approximately $500,000. Of this amount, $169,200 represented the installed cost of plant improvements and additions which Government experts considered as "having value to the contractor or Government." The story of how these facilities were handled in the negotiated termination settlement is clearly narrated in the following excerpts from the negotiator's report:

> Summarized, the Production Service Branch found that it would cost the Government $25,000 to dismantle and remove the rehabilitation, while the total potential salvage value of such property was only $5,000. On the other hand, the value of the Contractor's plant would be enhanced approximately $32,000 if the rehabilitation were left in place and intact.
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> The attention of the Contracting Officer was directed to the provision of Regulation No. 6 of the Surplus Property Board requiring that "sales of all plant equipment, not readily severable, shall be made at the fair value thereof. Fair value shall be determined by the owning agency . . . . , and in order to prevent windfalls, primary consideration shall be given to the value of the plant equipment to the owner of the premises for the purpose for which it is to be used." After being informed that the rehabilitation property would enhance the contractor's plant by approximately $32,000, all reasonable efforts were made to obtain a fair and proper purchase offer from the Contractor. However, the Contractor insisted that the plant used for the tank program had been idle prior to the war program and probably would not be operated after

the reconversion period. Moreover, the contractor contended that, even if the plant were operated, no-one could predict the use to which it would be devoted or the value of the plant improvements to such use. Accordingly, the contractor declined to make an offer to purchase the plant improvements and additions.

On the other hand, the Government could not economically dismantle and remove the property. Not only would it be out of pocket, but, in addition, the Government probably would have been confronted with a claim for restoration of the buildings to their original conditions. This matter likewise was referred to the Equipment Disposal Board, and the Board opposed removing the rehabilitation property.

In view of all these circumstances, the Contracting Officer and his associates decided that the Government's interests would best be served by passing title to rehabilitation property to the Contractor as part of the negotiated settlement. This concession by the Government was then used as a lever to persuade the Contractor to reduce its claim for a fixed-fee and to forego any present or future claims for restoration of the plant to its original conditions.

Case Two likewise involved a tank contract, but here negotiations for sale of plant improvements and additions were commenced prior to termination at a time when the contractor displayed some interest in acquiring these facilities. The sale was consummated after termination of the contract, and both parties considered the deal as a preliminary part of the termination settlement. Room for give and take in the negotiations was furnished by provisions in the contract obligating the Government to bear the cost of relocating the contractors own facilities in the places from which they had been removed, and to reimburse the contractor for the expense of deferred plant repairs which could not be undertaken during performance of the contract. In arranging for the sale the parties agreed upon both the estimated cost of discharging those obligations of the Government and the apparent value of the built-in facilities to the contractor. These double-headed negotiations resulted in sale of facilities costing about $600,000 (installed) for $159,100, with the contractor receiving a credit of $139,100 for releasing the above-stated obligations of the Government (which he had originally evaluated at $345,000). All concerned were well satisfied that the Government received a fair and reasonable return for its property.

Case Three involved the negotiated settlement of a terminated $22,600,000 contract for carbines and carbine barrels. The negotiator's report again furnishes the most realistic account of the manner in which the sale price of built-in facilities was established. In noting the following passage from the report, it is important to consider the background, consisting mainly of a termination claim by the contractor for more than $800,000:

The amount paid to the contractor took into consideration the settlement of the government's interest in plant improvements. The Government had paid the entire cost, or a substantial part of the cost, of a bus duct system, a subterranean rifle range,

lighting fixtures, elevator alterations, dry kiln improvements, blow pipe installations, furnace pits, heat-treating room, steel floor plates and airline installation. The total amount the Government had paid in connection with these improvements was $263,505.59. The estimated cost of the material was $128,770.00. The [contractor] offered to pay to the Government $27,111.00 for these installations. An appraisal by Government representatives placed the value of these installations at the end of the contract at $47,200.00. It was estimated by Ordnance personnel that the cost of removal of these improvements would be $25,000.00 and that recovery value after removal would be $12,000.00. Under the circumstances it was agreed with the contractor that he would pay $37,000.00 for title to such installations and the negotiated settlement was adjusted in this amount.[23]

The contention might be raised that sale of Government property as part of the negotiated settlement of a terminated contract involves the danger that less than the stated consideration for the property would actually be received because the contractor will be rewarded with a more liberal settlement of his termination claim. This danger is recognized, but the principal safeguards of the public interest are the same whether a sale and termination settlement are consolidated or arranged separately. In the ultimate analysis, the net result in either event depends upon the integrity of the individual negotiators and the reviewing authorities to whom their recommendations are presented for final approval. Great confidence and responsibility having been placed in these men, the only conclusion is that joining the sale of not-readily-severable facilities with termination settlement negotiations affords the best and most practical opportunity of protecting the Government's interests. Speedy termination settlements might by-pass this opportunity.

[23] A fourth case supplies an object lesson that even in a negotiated settlement it sometimes is difficult for the Government to overcome the contractor's favorable position in bargaining for the purchase of built-in facilities. Consider the following passage from the negotiator's report: "In connection with the contract certain improvements and additions were made to the contractor's property where the contract was performed. The Government had title to these improvements and had paid $104,413.48 for the cost of the work. Of this amount it was estimated that the cost of material alone was $60,955.00. As most of this property was attached to the real estate, it was estimated that the cost of removal would be approximately $30,000.00 and that the estimated value after removal would be approximately $10,850.00. The Disposal and Salvage Unit of this office stated that it believed a fair price for this rehabilitation work was $27,775.00. However, the contractor contended that this rehabilitation was of small value to him. The only installations which had any immediate value were certain electrical installations which he could use in connection with a Navy contract. For the contractor's purpose equipment which would cost approximately $1,500.000 to install would be sufficient and, therefore, the contractor was willing to pay only $1,800.00 for the electrical installations and $200.00 for all of the other equipment which the Government had erected. Although it was believed this was a small return for the improvements, as it would cost the Government more to remove the facilities than they would be worth and as the possible use upon removal would be uncertain, it was believed that the sale should be made. Therefore, simultaneously with the execution of the termination settlement a sales agreement conveying title to this property to the contractor was executed. This sale was reviewed and approved by the Disposal Board of this office."

The favoring of negotiated termination settlements to guard the Government's interests in built-in facilities might seem anomalous in so far as many contracts run to completion and few were drafted in anticipation of their being terminated and settled by negotiation. Admitting the anomaly, nevertheless it appears that the circumstances of termination and settlement by negotiation fortuitously furnish a means of aiding the Government in an otherwise unfavorable situation. Early in the procurement program contracting agencies recognized that the reservation of title to not-readily-severable facilities constituted a poor device for insuring fair compensation to the Government for bearing the cost of these facilities.[24] However, the need for production, coupled with the strong bargaining position of potential contractors, led to making that arrangement rather common. Whether or not this expedient was wise or justifiable, the fact is that at the end of the war the Government had title to such improvements and additions in contractors' plants as walls, smokestacks, floors, heating systems, plumbing, power and lighting systems, concrete foundations, and many other objects nicely integrated into the contractors' premises. Pyramided upon the uneconomical cost of effecting removal, in some cases the Government was obligated by contract to pay the expense of repairing any damage to the contractor's plant resulting from removal.[25] Furthermore, at least one contractor whose plant was

[24] Consider, for example, the following excerpts from Ordnance Fiscal Circular No. 31, dated May 8, 1942:

"Title in the Government is, as a general rule, the best protection of the Government's interest in facilities. However, in certain instances use of none of the standardized methods of providing new facilities is practicable, usually because it is not feasible or not desirable for the Government to take title to the facilities. One reason why it may not be feasible for the Government to take title is inseparability of the new facilities from existing privately-owned facilities (examples are "rehabilitation" of a building, "scrambled" facilities, or adaptation of a machine). In these special instances detailed agreements must be entered into to protect the Government's interest in the facilities."

"As far as practicable, direct payment or direct reimbursement by the Government for the cost of new facilities should be confined to facilities which themselves form a separate unit . . . . or which are readily removable or separable from the contractor's existing plant without unreasonable expense or loss of value."

[25] An interesting sidelight on the attempts of contractors and termination negotiators to improve their respective bargaining positions concerns the measure of damages assessable against the Government if it fails to remove its built-in facilities where required by contract to bear the expense of removal. Several contractors have asserted that, even though the built-in facilities did not diminish the value of the plant or its usefulness, the Government would be liable in damages for the estimated total cost of accomplishing removal. On the other hand, the Chicago Ordnance District generally has adopted the attitude that, in view of the principles of minimizing damages, the Government's failure would be compensable in damages measured by the smallest of the following amounts: (1) The monetary equivalent of the lost value or usefulness of the plant to the contractor; (2) The cost to the contractor of removing the Government-owned articles; (3) The cost to the contractor of restoring the value or usefulness of the plant by means other than removal of the Government-owned facilities. One

extensively improved with Government funds raised the troublesome contention that title to all built-in improvements automatically passed to him since the articles became an essential part of his realty.[26] In view of these circumstances, it should not be difficult to appreciate the benefits—however anomalous—conferred by termination and subsequent negotiations in which all trumps are not held in one hand.

RESERVATION OF SUBCONTRACT CLAIMS IN SETTLEMENTS

Since the very beginning of the termination program claims of subcontractors, unlike facilities questions, have been treated as within the kernel of settlements. The difference in attitude toward the two features rests on an *apparent* distinction in underlying principles. As previously noted, facilities problems generally are regarded as unrelated to fair comsation for termination claims, and therefore might seem almost foreign to a termination settlement. Subcontractors' claims, on the other hand,

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corollary of this position is that only nominal damages would be assessable where failure to remove facilities merely caused annoyance or slight inconvenience to the contractor.

Another question frequently raised concerns the types of damages to contractors' plants which the Government will bear the expense of repairing where by contract the Government is required to pay the cost of removing its facilities. Answering this question necessitated an interpretation of the policy of the War Department that the cost of reconverting a contractor's plant to commercial production will not be borne by the Government except in the few instances where required by express covenants. The interpretation finally adopted is as follows: "In connection with the dismantling of plant equipment and its removal from the contractor's plant, this policy [of not paying reconversion costs] is interpreted to prohibit reimbursement of the contractor (or the assumption by the Government of the obligation to perform the work) for any items of expense relating to the restoration, repair, or alteration of the premises in order to correct a condition which was created by or resulted from the installation of the plant equipment. . . . . It is recognized, however, that incidental structural damage may in some cases be caused to the premises by the operations of dismantling the plant equipment or removing it from the plant. Wherever such damage is directly and intentionally caused in the process of performing an operation which the Government is obligated by the terms of the particular contract to perform (or for the performance of which the Government is obligated to reimburse the contractor), the obligation will be interpreted to include the repair of such incidental damage at Government expense." Joint Termination Regulation (8–10–45) para. 861.2 (4) and (5).

[26] The Illinois courts have frequently asserted, by way of dictum, that annexed articles may not be continued as personal property where: (1) removal of the article necessarily entails material injury or serious and lasting damage to the realty, or (2) removal could not be accomplished without materially injuring the article itself or seriously impairing its usefulness. Sword v. Low, 122 Ill. 487, 497, 13 N.E. 826, 829 (1887); Holland Furnace Co. v. Lithuanian, etc. Ass'n, 286 Ill. App. 453, 464, 13 N.E. 2d 934, 938 (1936); see also Ford v. Cobb, 20 N.Y. 344 (1859), repeatedly cited by Illinois decisions. However, the cases mentioning such a limitation involved the rights of third persons whose interest in the real estate would be prejudiced if the realty were seriously injured through removal of the annexed articles. The rationale of the limitation disappears where rights of parties outside the agreement to continue annexations as personalty have not intervened. See dissenting opinion in Bank of Republic v. Wells-Jackson Corp., 358 Ill. 356, 364, 193 N.E. 215, 221 (1934).

form a part of the prime contractor's charges and often are intricately tied in with costs incurred by the prime contractor in his own production operations. Stated in another manner, negotiators and contractors immediately understand that subcontract costs clearly are part of the cost of the supply items being procured, while they commonly fail to recognize that loss of or damage to Government-owned property, or sale of such property at unreasonably low prices, likewise affects the cost of the supply item. Consequently, unlike the attitude toward facilities questions, concerted efforts usually are made to settle and pay subcontract claims as part of the settlement of a terminated prime contract.

Despite this approach, the reservation of subcontract claims is the most common nonroutine exception in termination settlements of the Chicago Ordnance District. An examination of substantially all of the termination agreements executed by the District *prior to V-J Day* and involving settlements in excess of $100,000 revealed that in 12 per cent of the cases certain rights relating to subcontract claims were reserved. These delays in settling with subcontractors usually stemmed from one or more of the following facts: (1) the subcontractor asserted a claim for an excessive amount; (2) the subcontractor was dilatory in presenting his claim; (3) the higher tier contractor had, or alleged he had, an unliquidated set-off against the subcontractor; and (4) the subcontractor's claim arose from matters not attributable to the termination of the prime contract. An analysis of these four difficulties encountered in the settlement of subcontracts will serve to illuminate the background and environment giving rise to those termination agreements which are incomplete as to subcontract claims.

First, consider the simple case of an immediate subcontractor who presents an excessive claim. The prime contractor after some investigation makes a determination that the claim is high, and upon reaching this conclusion, instead of promptly approving the charges for payment, sends an expeditor to the subcontractor's plant to straighten out the difficulty. After reasonable efforts, and especially if the contracting agency is urging immediate action, the prime passes the problem on to the Government representative in charge of the settlement of the prime contract. Doubting the claim, the prime contractor of course refuses to execute the usual certificate that it is fair and reasonable and not more favorable to the subcontractor than if reimbursement by the Government were not involved.[27] Failure to certify the claim is an automatic red flag to the Government negotiator, so he calls for an office review of the claim by an au-

[27] Joint Termination Regulation (8-10-45) para. 632.

ditor. If it is believed the charges are padded, a more detailed field audit may be requested. After the facts are assembled by the auditor, the negotiator normally attempts to arrange a meeting with both the prime contractor and the subcontractor in the hope that the difficulty can be ironed out. All of this takes time, and the further down the contractual chain the subcontractor is the more time it takes. If other parts of the prime contractor's claim are agreed upon and it appears that the subcontract claim cannot be closed within a reasonable time, the tendency has been to close the prime contract and reserve the delayed issue for future settlement.

A substantial portion of the excessive claims filed by subcontractors has been the product of inexperience. In spite of the efforts of the Smaller War Plants Corporation and the various training teams sponsored by the Government termination organizations, many subcontractors operating small businesses have not become familiar with termination regulations. Even though these subcontractors had access to training courses and termination literature, they generally did not employ accounting and legal specialists or negotiating talent charged with the responsibility of keeping informed as to termination developments. Contractors who have dealt directly with the Government generally have had numerous terminations, and so by actual experience have gained facility in termination operations and knowledge of termination rules. Moreover, these companies have had the advantage of securing much of their information at first hand from Government negotiators thoroughly conversant with the gamut of practical termination problems. Because of this experience prime contractors have made great strides forward in reducing the number of excessive claims and eliminating the few padded ones. The reports of the Office of Contract Settlement show that prior to June 30, 1944, terminations of fixed price contracts involving charges were settled for 80 per cent of the amount originally claimed by the contractors;[28] while in June of 1945, such claims were being settled for 92 per cent of the amount initially requested.[29] This difference undoubtedly reflects increased accuracy in the presentation of claims by prime contractors and greater familiarity with termination regulations.

Of the many excessive claims filed by subcontractors due to inexperience, most have been adjusted without delaying the complete closing of the prime contract terminations. On the other hand, a type of "excessive"

[28] First Report (War Contract Terminations and Settlements) by the Director of Contract Settlement to the Congress, October, 1944, Appendix C, Table 1, p. 3c.

[29] Fourth Report (War Contract Terminations and Settlements) by the Director of Contract Settlement to the Congress, July, 1945, Appendix B, p. 39.

claim which repeatedly has resulted in reservations in the termination settlement of prime contracts is that arising because the subcontractor insisted upon taking advantage of all legal rights under his subcontract or purchase order—which often permitted him to claim amounts in excess of those allowable under Government termination regulations. Such contentions are possible because of the lack of uniformity among contractual termination arrangements in subcontracts.

Although a uniform termination article for use in subcontracts was recommended by the Government in May of 1944,[30] this was too late to secure general adoption. Most contractors had worked out their own forms and were not eager to change. Many of the forms in use were an adaptation of the uniform termination article for fixed price supply contracts with the Government, and therefore similar to the recommended article for use in subcontracts. Numerous purchase orders and subcontracts outstanding at the end of the war, however, contained either no provision for termination or provisions permitting claims in excess of amounts allowable under accepted Government termination principles. The vast majority of subcontractors have not attempted to press these rights against their customers to the legal limit, but it is nevertheless true that the lack of standard legal arrangements permits an area for disagreement which might have been avoided had a uniform subcontract termination article been in use.

Typical of the problems which might have been avoided by better termination provisions in subcontracts are the disputes concerning the allowability of anticipated profit. Under the common law, profit which a contractor would have made had he completed the contract is generally a proper element of damages for breach of contract, provided the profit is demonstrable and not speculative.[31] The Government, however, is firmly committed to a policy of paying a profit only on work done.[32] From a time early in the war the termination articles in prime contracts have provided that where settlement is by formula, a reasonable profit will be allowed exclusively on costs actually incurred under the contract.[33] If a prime contractor demanded anticipated profit, he could be forced to a formula settlement, an alternative that scarcely any contractors have

[30] Directive Order 6 of the Office of War Mobilization, dated May 29, 1944. See also Office of Contract Settlement Regulation No. 6, contained in Joint Termination Regulation (4–20–45) p. 2526.

[31] 5 Williston, Contracts §§ 1299, 1345, 1346 (rev. ed. 1936).

[32] Joint Termination Regulation (8–10–45) para. 533.1.

[33] Joint Termination Regulation (4–20–45) para. 931.

wished to face. The contracting agencies hoped that the same principle would be incorporated into all purchase orders and subcontracts, and when a recommended form of subcontract article was issued by the Government it contained such a provision.[34] In addition, when claims for anticipated profit arose under subcontracts containing no corresponding limitation the Government announced that claims for unearned profit would be reimbursed only when and if they were reduced to judgment.[35]

Thus far all claims presented to the Chicago Ordnance District by subcontractors for anticipated profit have been rejected. In at least one instance, insistence upon the full profit required the exclusion of the particular subcontract claim from the settlement with the prime contractor. One year later the subcontractor in that case consented to settle in accordance with accepted principles for computation of profit, having threatened for eleven months that he would carry the matter to court but in the end abandoning his point. By and large the cases decisively show that the claims for anticipated profit, as well as other claims which might be legally enforceable under the terms of particular termination articles but which are in excess of fair compensation and reasonable profit under the terms of the Contract Settlement Act of 1944, are used principally as negotiating weapons to assist subcontractors in positioning themselves for favorable settlements. In the last analysis the overwhelming majority of businessmen have been willing to abide by the rules which have been adopted nationally.

The second general reason subcontract claims were reserved in termination settlements prior to V-J Day was delay in presentation of the claims. Sometimes the most earnest efforts by higher-tier contractors failed to secure timely presentation of subcontractors' claims.[36] With primary emphasis on production, there was considerable inertia retarding the preparation and filing of claims by contractors not dealing directly with the Government. In some cases, moreover, the very remoteness of subcontractors from the prime contractor made it impossible to settle a dispute

[34] See note 30, supra.

[35] Joint Termination Regulation (8–10–45) para. 625.1.

[36] This fact is forcefully illustrated by the following excerpt from a letter written by a Chicago Ordnance District prime contractor to one of his subcontractors whose claim had been excepted from the prime's settlement with the Government. "As long as we are handling this matter, we will endeavor to administer the claim fairly, having regard to any contractual rights of the parties and any rights arising out of the Contract Settlement Act. However, our own contract with the Government was terminated nearly a year ago, and when we tell you that if we are to administer this claim we expect to have it filed within thirty days, we are not 'arbitrarily imposing a thirty day limitation.' We do not believe that it is either customary fair business or Government practice to permit matters such as this to drag along indefinitely."

between subs as quickly as the claim of the prime. It must be remembered that basically settlements follow the contractual chain: the Government deals with the prime contractor; the prime deals with his subcontractor; and the sub deals with his sub-subcontractor. Even at best it takes time for termination notices to travel down the contractual line and for claims to come back up. The time available to lower-tier contractors to settle claims must be somewhat less than that available to primes if all contracts in a hierarchy are to be closed when the prime settlement is reached. With shorter deadlines for settlements of prime contracts the problem of getting claims and settlements up the chain on time increases.

As a corollary to this matter of speed, legal complications are foreseeable in the case where there has been unreasonable delay in passing termination notices down the line. After receipt of notice of termination the prime contractor, under his contract with the Government, is obligated to terminate his orders and subcontracts; and it is contemplated that termination notices shall be passed to lower-tier contractors as rapidly as practicable. If any subcontractor continues work after the time a termination notice should have been received, neither he nor any higher-tier contractor is entitled to compensation or reimbursement from the Government for that work.[37] Where the Government will not be financially responsible for the extra work performed, the subcontractor nevertheless may have a perfectly good claim against his customer who failed to give notice of termination promptly.[38]

The third circumstance which prior to V-J Day gave rise to subcontract reservations in termination settlements was delay in reaching an agreement with the subcontractor because of the existence of unliquidated set-offs in favor of the next-higher-tier contractor. Many subcontractors had limited financial resources, especially when considered in the light of the extensive expansion necessary to meet wartime production requirements. Whereas prime contractors ordinarily looked to the Government for financial support or had established financial connections through which sizable loans could be secured, the subcontractor frequently was forced to rely on his customer for additional capital. In many cases the customer advanced money to the subcontractor. In some cases the customer furnished facilities to the subcontractor. Frequently engineering assistance was provided.

[37] A review made by the Government shortly after V-J Day of the flow of termination notices to several major subcontractors indicated the possibility that some higher-tier contractors may have unnecessarily delayed cancellation of their purchase orders and subcontracts in certain instances. Army Service Forces Circular No. 338, September 7, 1945.

[38] Joint Termination Regulation (6-20-45) para. 251.3.

Many of these dependent subcontractors were not the best producers. Some were "war babies" with few experienced persons in their organizations. Others were established peacetime companies attempting to produce items entirely foreign to their usual lines. A considerable number were marginal producers to whom the war had given another lease on life. A sizable group of companies in all these classes failed in production or produced few acceptable items, while turning out great quantities which were rejected for failure to comply with Government specifications. Not infrequently the customers accepted the defective material and reworked it in order to have necessary parts in time.

As terminations came to these inferior producers, the occasion for reckoning with their customers also arrived. With managements concentrating on production rather than the financial situation, the fringe companies sometimes had failed to appreciate the extent of the various claims which the customers held and which had not been pressed perhaps because of a desire not to jeopardize further the subcontractors' production. With the full presentation of such set-offs against a subcontractor's termination claim, hard feelings occasionally resulted. In a few cases the parties reached the stage where they were hardly on speaking terms. Anticipating the set-offs, the subcontractor sometimes made his claim as high as he thought possible, and, invariably, the hard-fisted customer rebeled at paying proportionately more on termination to the inefficient and expensive producer than to top-notch suppliers. Under these circumstances negotiations frequently have been slow, and it has been necessary to except from the prime settlement the unsettled liabilities arising out of the tangled relationship.

The fourth kind of disagreement observed prior to V-J Day occurred when a subcontractor asserted a claim arising from matters not attributable to the termination or modification of the prime contract. A reasonable number of finished items in the plant of the subcontractor at the time of termination are proper elements of a termination claim and may be included at the subcontract price,[39] but an open account for items delivered prior to termination and for which the subcontractor has not been paid do not form a proper part of a termination claim.[40] Similarly, claims for an increased price for finished units delivered prior to termination and arising from a change in specifications do not constitute proper termination charges.[41] To adopt any other position would not only result in the

[39] Joint Termination Regulation (8–10–45) para. 541.1.

[40] Ibid., para. 541.2 and 541.3.

[41] Ibid.

Government's paying again in a termination settlement for part of the cost of the finished items for which it previously had paid the prime contractor, but would also make the Government a guarantor of every credit risk subcontractors might have taken under a terminated war contract. More than one subcontractor, however, has insisted upon including these improper elements in his termination settlement proposal, with the result that agreement could not easily be reached.

Another difficulty of this type can be illustrated by a case which the Chicago Ordnance District recently considered. A large prime contractor cancelled a purchase order issued to one of his suppliers because in his opinion the supplier was in default. Subsequently, the prime's contract was terminated. In the settlement of this termination, rights of the defaulted subcontractor were excepted because of disagreement between the parties. Thereafter the facts were investigated by the Government in order to determine whether the claim being asserted by the subcontractor could be considered as proper for reimbursement. It was stressed in behalf of the subcontractor that the Contract Settlement Act authorizes not only the settlement of claims for a termination but also the settlement of any other claims arising under a terminated war contract.

As pointed out by the subcontractor, section 3(h) of the act defines "termination claim" as "any claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this Act authorize to be asserted and settled in connection with any termination settlement." However, section 3(d) of the act states that the words "termination," "terminate," and "terminated" refer to "the termination or cancellation, in whole or in part, ... of work under a subcontract for any reason *except the default of the subcontractor*." It is therefore clear that the phrase "termination claim" does not include a claim arising out of the termination of a purchase order because of the subcontractor's own default.

Although this may appear elementary, it is not so easily understood by the subcontractor who has received notice of a default termination a few days prior to a general termination of war contracts for the convenience of the Government. He may well feel that to deny reimbursement of his claim is discriminatory. Yet under the Contract Settlement Act and the regulations issued pursuant to it the contracting agency has no other choice. If the subcontractor persists in asserting his claim, a reservation in the prime settlement agreement becomes likely.

The above analysis of reasons for subcontract reservations is based

upon a study of terminated contracts settled prior to the surrender of Japan, and accordingly does not fully reflect the peculiar conditions existing at the time of mass terminations of war contracts. With V-J Day, the program for speedy terminations was stepped up. Primary emphasis was shifted from production to terminations. The great pressure to settle quickly thousands of terminations occurring simultaneously had obvious effects upon delaying subcontract settlements. To the existing difficulties of settling subcontracts new ones were added.

Many subcontractors were faced with the problem of filing their first termination claims. Some had never had a contract terminated; others previously had absorbed any termination costs without filing claims. For a large group the time had come to "sweep the cellar"—nothing was to be overlooked in their final claims. Many times in the past it had been possible to divert inventory to other jobs, and frequently there had been advance warning of terminations. Terminations at the end of the war came suddenly and left few opportunities to run out inventory on hand.

When these war-end terminations came, there was no further opportunity for preparation in settlement procedures and many subcontractors were still unprepared. Shortly before V-J Day the Director of Contract Settlement reported that a survey covering a sample of contractors with fewer than 400 employees revealed that 25 per cent of these smaller contractors were only partially prepared or were entirely unprepared for termination.[42] While over 85 per cent of subcontract cancellations were being settled without claim a short time before the conclusion of hostilities in Europe,[43] with the end of the war in all theaters and the prospect of greatly reduced business, many subcontractors for the first time were confronted with the problem of settling numerous terminations with charges, some of a complex nature, relying on organizations relatively uninformed as to the rules of the game.

Another factor affecting subcontract settlements after V-J Day was the changed position of Government personnel. Prior to that time many Government termination negotiators assisted considerably in working out subcontractor difficulties. Where the Ordnance Department was on notice that a controversy existed, even between a remote subcontractor and an intermediate contractor with whom the Government had no privity of contract, the negotiator might intercede, ordinarily at the request of one

[42] Fourth Report (War Contract Terminations and Settlements) by the Director of Contract Settlement to the Congress, July, 1945, p. 12.

[43] Third Report (War Contract Terminations and Settlements) by the Director of Contract Settlement to the Congress, April, 1945, p. 4.

of the parties, to assist in reaching a speedy adjustment of the differences. Normally such informal arbitration quickly disposed of disputes. Following V-J Day, however, Government negotiators had their desks piled high with prime contract termination problems, and had little opportunity to straighten out kinks in the contractual chain.

Since V-J Day it has also become apparent that a very substantial number of subcontract reservations arise in connection with the policy of interdistrict subcontract delegations. In the Ordnance Department, as well as in other services, termination responsibilities have been largely decentralized to district offices. These districts have reached an understanding that the district administering a terminated prime contract may delegate the negotiation of a subcontract claim to the district in which the subcontractor is located. The Chicago Ordnance District, for example, to September 1, 1945, had received 816 such delegations from other districts and had made 980 delegations. If this process of delegation functioned perfectly, it would not lead to reservations in the prime settlement agreements. The district receiving the delegation would negotiate the subcontract claim promptly and report an approved settlement amount to the prime district in time for inclusion in the settlement agreement with the prime contractor. In practice, however, delegated claims have not always been adjusted by the date the prime district is ready to close its deal—and consequently a considerable number of the delegated claims have been reserved.

The impact of all these additional factors which became evident *after V-J Day* points to an increase in the reservation of subcontract matters in termination settlements. At this writing the Chicago Ordnance District has settled very few of the more complicated terminations effectuated at V-J Day, so the full force of the added considerations has not been felt.[43a] Nevertheless, these factors, along with the augmented pressure to close terminations, already has enlarged the relative number of incomplete termination settlements. Of the settlement agreements presented to the review board of the Chicago Ordnance District during September, 1945, 50 per cent reserved from the settlement one or more subcontract claims.[44]

As an outgrowth of the demand for speed in termination settlements, there seem to be two potential sources for *future* trouble. The first, con-

[43a] In one of the first large terminations settled after V-J Day (and after the text of this article was prepared) claims of 30 subcontractors were excepted from the prime settlement agreement.

[44] Proposed termination settlements involving over $25,000 are submitted to the Settlement Review Board of the Chicago Ordnance District.

cerning which signs already have appeared, is that the claims of some subcontractors will have been disregarded or forgotten in the rush to close settlements of prime contracts. Having entered into mutual releases with the Government, the prime contractors in these cases might well be cold to any propositions of the excluded subcontractors. More than one prime contractor in this situation has bluntly told the subcontractor to file suit and wait for a judgment. As a result, the contracting agency may be confronted with the plea under section 7(f) of the Contract Settlement Act that "equity and good conscience require fair compensation for the termination of a war contract to be paid to a subcontractor who has been deprived of and cannot otherwise reasonably secure such fair compensation." In cases of this nature the Chicago Ordnance District has taken the position that direct payment to the subcontractor will not be considered unless the higher-tier war contractor is bankrupt or insolvent.[45] However, where other unusual circumstances exist, the service involved may consider reopening the prime settlement, under the principles discussed in the final section of this article, in order to permit reimbursement of the excluded claim.

The second and probably more frequent source of future difficulties will be the subcontract problems recognized in and reserved from termination settlements. A contracting agency cannot consider a terminated contract completely closed until such reservations have been cleared up; and in many cases the excepted subcontract matters involve complexities. An unusual illustration of the possibilities for complications existing after execution of a prime settlement agreement was exhibited in connection with the termination of a large contract for carbines settled by the Chicago Ordnance District. As the time for settlement approached two subcontractors, both controlled by the same interests, were in violent disagreement with the prime contractor. To avert delay in closing the prime settlement, Ordnance Department representatives intervened actively, in the hope that some form of mediation would expedite agreement. The Government representatives failed to bring the parties together, and in the final negotiation the prime contractor was indemnified against further liability to these two suppliers. Attorneys for the subcontractors immediately appealed to Ordnance personnel for direct payment of their

[45] In the event payment is made by the Government to a subcontractor whose customer is insolvent or bankrupt, questions arise (1) as to whether a voidable preference results from such payment, and (2) as to the position of the Government as a claimant in the estate of the bankrupt customer in those cases where the Government has taken an assignment of the termination claim of the subcontractor. See Op. Judge Advocate General, SPJGC 1944/12685; Op. Att. Gen. of the United States, dated May 19, 1945.

clients' claims, citing the objectives of the Contract Settlement Act as reasons why the Government was required to deal directly with the subcontractors. Upon failing to secure payments directly from the Government, the subcontractors then submitted their cases to the Appeal Board of the Office of Contract Settlement without the consent of the prime contractor[46] and without the specific assumption of the claims by the Government.[47] The Appeal Board concluded its opinion by stating:

> In neither the Kal nor the Precision case is there proof that the contracting agency undertook to make direct settlement or accepted responsibility therefor under Section 7(d). On the contrary, the memorandum agreements of November 24, 1944 provided that, subject to approval by the Ordnance Award Board the prime contractor was authorized to pay the respective agreed amounts. It is true that the Government did endeavor, by negotiating directly with the subcontractors, to facilitate agreements between the prime contractor and the subcontractors, but this was done because of the impasse between the parties and in order to expedite complete settlement of the prime contract. In conducting these negotiations, the Government was merely discharging the duties imposed by Section 6 to provide speedy and fair compensation for war contractors, and by Section 20(f) to advise, aid and assist contractors in preparing and presenting termination claims. Such acts of assistance did not make the Government "responsible for settling appellants" claims, within the meaning of Section 13(a) so as to give a right of appeal.[48]

In establishing the principle that the intervention of Government representatives in an informal manner does not give a subcontractor the right to assert a claim directly against the Government,[49] the decision of the Appeal Board provides a firm foundation to the practice of informal arbitration by termination negotiators. Even so, this practice probably

[46] See section 13(f)(1) of the Contract Settlement Act of 1944; rule 12 of Office of Contract Settlement Regulation No. 15, contained in Joint Termination Regulation (4-20-45) p. 2549.

[47] See section 7(d) of the Contract Settlement Act of 1944; rule 4 of Office of Contract Settlement Regulation No. 15, contained in Joint Termination Regulation (8-10-45) p. 2548-D.

[48] Precision Metal & Machine Co. v. War Department; Kal Machine Works, Inc. v. War Department, Office of Contract Settlement Appeal Board, Proceeding Nos. 8 and 9, August 6, 1945, CCH War Law Service, 3 CCF 1001.

[49] The difficulties of taking any other position are easily illustrated. For example, assume that a dispute exists between a first-tier subcontractor and a prime contractor. The subcontractor appeals directly to the Appeal Board of the Office of Contract Settlement, but the prime contractor does not give his consent to the appeal. When the hearing takes place the subcontractor and the Government will be represented. Unless it is found that the Government has assumed the subcontract claim and is obligated to settle it directly, the decision of the Appeal Board cannot be conclusive. The prime contractor is the party against whom the right to recover exists and the prime contractor is not a party to the appeal proceedings. In order to hold the prime contractor liable, the issues in the case would have to be submitted de novo to the courts, for there would be no basis for enforcing a judgment of the Appeal Board against a party who had not been represented before the Board. This is especially clear in the frequent case where the prime contractor and subcontractor are in disagreement over amounts due or overpaid on the completed portion of the supply contract.

will not be an adequate mechanism to cope with all the complicated subcontract matters likely to be reserved in termination settlements. In the first place, after the initial rush of V-J Day termination settlements is past and it is again possible for Government representatives to turn their attention to these vexatious subcontract cases, many of the more able and experienced negotiators will have returned to private business. Since a substantial number of the reserved cases undoubtedly will involve personality difficulties and strained feelings between the parties, the prospective lack of tactful negotiators increases the likelihood that some of these deferred cases may end up in the courts.

In the second place, whether the contracting agency *excepts* the deferred subcontract matter from the prime-settlement agreement, or *assumes* the subcontract claim for direct settlement by the Government, the position of the contracting agency often is not wholly satisfactory. Where the contracting agency merely excepts the claim from the prime termination settlement, the Government does not assume responsibility for the settlement, and the burden of taking further action rests on the prime contractor. The prime thereafter may not be greatly concerned about speedy settlement of the reserved subcontract since he will have received all the money he is entitled to by way of the prime settlement. Thus, it may be incumbent upon the contracting agency to exert pressure upon the prime contractors to clear up these exceptions.

From an operating point of view the assumption of subcontract claims for direct settlement by the Government provides even greater hazards. Assumptions not only result in undermining the basic principle that a terminated contract should be settled through the contractual chain, but may greatly handicap Government negotiators in later completing deals with the subcontractors.[50] As previously noted, many subcontracts which cannot be settled promptly involve certain complexities, and if the customer is relieved of all responsibility with respect to these contracts, his cooperation in attempting to expedite a closure and in providing facts and figures essential to an equitable settlement may be reduced. In other words, the danger inherent in the assumption by the Government of a claim for direct settlement is that one of the parties responsible for setting

[50] This discussion contemplates a situation where the Government has assumed responsibility for the determination of the amount due on account of the termination of a subcontract and the payment of such amount to the subcontractor. However, in some instances the prime contractor and subcontractor may agree upon the amount of the subcontractor's claim and the Government merely assumes responsibility for payment. This latter procedure insures prompt payment to the subcontractor where a finance company holds an assignment of the prime contractor's contract with the Government. See also Joint Termination Regulation (6–20–45) para. 662.2 and note 45, above.

up and administering the contractual arrangement—the customer—is not a party to the settlement negotiations. This frequently impedes an intelligent examination and adjustment of the difficulties.

There are, however, several situations in which it is desirable for the Government to assume and directly settle claims of subcontractors. Direct settlement is required whenever a contracting agency is satisfied that a higher-tier war contractor is, or is in serious danger of becoming, unable to meet his obligations;[51] and it is permitted in cases where direct action is deemed by the Government to be necessary or desirable for expeditious and equitable settlements.[52] Soon after V-J Day, the necessity for direct settlement of common subcontractors became increasingly apparent. For example, a supplier may be producing an identical part for as many as thirty customers located in many parts of the country. Some of the purchasers may deal directly with the Government and others may be intermediate subcontractors. It is usually economical of time and manpower to have a single termination team settle all thirty terminations rather than require thirty different purchasing agents to work out thirty separate deals with the common supplier, whose inventories and costs under the various purchase orders are necessarily commingled. In these instances the local termination office of the Government frequently will make arrangements for audit and property disposal in behalf of all of the higher-tier contractors, and in some cases there would seem to be reason for the Government to assume and pay the entire claim directly rather than to require it to be allocated and channeled through the contractual chains. Generally, the only difficult question presented to the Government, when it assumes a claim of this kind for settlement, is the extent to which the common subcontractor's costs are properly allocable to war contracts. This problem tends to become increasingly troublesome the farther removed the subcontractor is from the prime contractors to whom his products are eventually delivered.

In explaining the causes of subcontract reservations in termination settlement agreements, and in noting signs that these will increase, it has not been intended to disparage all such reservations. On the contrary, many of these reservations—as in cases revolving about a common subcontractor or insolvent prime contractor—doubtless will be of types specifically contemplated by the Contract Settlement Act. Such reservations generally are of benefit to the subcontractor involved, since they avoid multiplication of his work in presenting and settling claims or in-

[51] Joint Termination Regulation (6-20-45) para. 662.3.

[52] Ibid., para. 662.4.

sure his receiving payment of termination charges. On the other hand, many reservations—such as those growing out of excessive claims, misunderstandings between customers and suppliers, and disputes involving rights of set-offs—probably will be based on situations which are aggravated by speedy termination settlements. In these cases the reservation generally is of no benefit to the subcontractor. Rather, the reservation may operate further to postpone the ultimate date of settling his claim, reduce the likelihood of settlement through mutual agreement, and handicap him in receiving prompt payment of his termination charges. Reviewing past cases, it is fair to add that in these situations the subcontractor whose claim is reserved frequently is in poor financial condition and may be placed in a disadvantageous position through delay in payment of his termination claim. Where this result prevails, one of the basic objectives of the Contract Settlement Act is defeated.

OPEN ISSUES AS TO TERMINATION INVENTORY

In contrast to the treatment of facilities questions and subcontract claims in settlement agreements, during the past year no settlement arranged by the Chicago Ordnance District has kept open under the terminated contract any rights or obligations as to inventory resulting from the termination.[53] Standard practice has required that all such inventory, including raw materials, purchased parts, work in process, finished components, sub-assemblies, and completed items, be accounted for prior to settlement. In effect this has meant that before the execution of the termination agreement all inventory is counted and checked to determine the contractor's claim for compensation, and then is sold or retained by the contractor or transferred to the Government, thus permitting disposal credits in favor of the Government to be calculated. Even where the contractor has agreed to store thereafter part of the inventory for the Government, all rights and liabilities pertaining to it under the terminated contract have been settled first. Under these circumstances, no need has arisen for reserving termination inventory matters from the general release in termination settlement agreements.[54]

[53] Current regulations define contractor inventory to include Government-owned facilities (Joint Termination Regulation [8-10-45] para. 400). As used in this article, however, the term "inventory" excludes such facilities.

[54] In every settlement agreement of the Chicago Ordnance District involving any payment to the contractor, the parties have agreed in substance that: "All contract and subcontract termination inventory (including scrap), has been retained, sold, returned to suppliers, stored for the Government, delivered to the Government, or otherwise properly accounted for, and all proceeds or retention prices thereof, if any, have been taken into account in arriving at this agreement."

Nevertheless, in effecting the disposition of termination inventories certain new rights and obligations which survive the termination settlement agreement may be created—some between the parties to the terminated contract. These open issues come into existence as part of the over-all settlement procedure and in many cases are not a product of speed in making settlements.

It is to be observed, however, that there is a self-contained fundamental connection between speed in settlements and termination inventory matters. Briefly, as the pace of settlement increases there is a corresponding reduction in the time available for inventories to be disposed of by contractors directly from their plants. To some extent there is a correlation between the length of this period of time and the quantity of inventory which can be redistributed into commercial channels by contractors. As a corollary, it follows that as settlements are speeded up, the amount of inventories turned over by contractors to the Government—and then placed in warehouses—tends to increase.

These relationships are to be viewed in the perspective of the *broad outlines* of the over-all national plan for accomplishing disposition of war surpluses not required by the military establishments. Disposition is initially to be made by contractors in possession of the inventories, subject to advance or specific approval of the contracting agencies involved. At this stage retentions by contractors are encouraged and all sales are between the contractors in possession and the purchasers. The termination article in prime contracts permits the contracting agencies to direct these sales by war contractors and, by implication, allows the contracting agencies to aid in locating buyers and expediting sales.[55] All such sales are to be made in accordance with the rules prescribed by the Surplus Property Board. Title to inventories which are not redistributed in this fashion (or abandoned) is then transferred to the contracting agencies. At this second level, unserviceable property may be sold by the contracting agencies as scrap or salvage under the regulations of the Surplus Property Board, but in practice contractors generally will have been previously directed to undertake this function.[56] Serviceable property at this level, on the other hand,

[55] The uniform termination article for fixed price supply prime contracts provides: "After receipt of a Notice of Termination and except as otherwise directed by the contracting officer, the contractor shall . . . use his best efforts to sell in the manner, to the extent, at the time, and at the price or prices directed or authorized by the contracting officer, any property . . . and . . . may retain any such property at a price or prices approved by the contracting officer; . . ." Joint Termination Regulation (4-20-45) para. 931.

[56] Contractors of the Chicago Ordnance District are directed to dispose of all unserviceable property so that the agency does not take title to such inventory.

is declared as surplus to the disposal agencies designated by the Surplus Property Board. It is then either shipped directly from contractors' plants to the disposal agencies or their designees or, pending disposition by these agencies, is stored by agreement with the contractors in possession or warehoused elsewhere by the contracting agencies. Ultimately, all of this serviceable property not needed by the military establishments is turned over to disposal agencies for disposition—such disposition being the third stage of the redistribution process.[57]

It is within the foregoing framework that the new and surviving issues concerning termination inventory must be considered. These issues will be examined in connection with three features commonly associated with disposition of termination inventories: (1) scrap warranties; (2) use representations; and (3) storage agreements.

The first new issue, that revolving about scrap warranties, affects a major share of all termination inventory. In general, where scrap in termination inventory is not retained for use by the contractor in possession or sold on competitive bids, the disposal must be at the best price obtainable and subject to the following warranty by the purchaser:[58]

> The undersigned represents and warrants to the United States that the property covered by this agreement was offered as scrap, that he is purchasing or retaining it only as scrap and that he will sell and ship or use it only as scrap, either in its existing condition or after further preparation, and only in conformity with all applicable regulations and orders of the Office of Price Administration and the War Production Board.[59]

The warranty is furnished to the seller but clearly runs in favor of the Government.

The function of the scrap warranty is primarily that of a safeguard against unconscionable windfalls resulting from negotiated sales. Where property is offered for sale in a wide market and then sold to the highest bidder at scrap prices, there is small likelihood that the purchaser can resell at an unreasonably large profit. On the other hand, where material is sold on a negotiated basis without a public offering, the possibility of undervaluation is greatly increased. This undervaluation may be substantial only if the material disposed of at scrap prices in fact has use other than

[57] A full discussion of this subject is contained in Olverson, Legal Aspects of Surplus War Property Disposal, 31 Vir. L. Rev. 550 (1945).

[58] Joint Termination Regulation (8-10-45) para. 445.5, 446.3 (requiring warranty); 445.4 (not requiring warranty when property is sold on competitive bids); 445.4 (not requiring warranty when property is retained for use); 441 (miscellaneous categories of dispositions not requiring warranty).

[59] Joint Termination Regulation (8-10-45) para. 411.13.

as scrap. One means which has been employed to guard against other use, and thus realization of speculative profits, has been to mutilate the property prior to sale and so render it unusable except as scrap. Although such deliberate destruction undoubtedly will avoid resales at scandalous profits, it is costly and basically unsound economically. The scrap warranty outlaws speculative resales, but does not compel mutilation of property for which a use other than as scrap may later be found.

The significance of the use made of scrap warranties is to be appraised in the light of the sequence of situations following demands for swift plant clearances. Under existing regulations contracting agencies frequently have found that serviceable property not retained for use by contractors in possession cannot be disposed of expeditiously. To sell quantities of such property, regulations require contractors in possession to advertise the items at least seven days prior to sale, and the administrative details incident to this procedure usually consume several weeks.[60] Moreover, few contractors or contracting agencies have established organizations or market outlets for accomplishing rapid sales of serviceable property; and, desiring quick termination settlements, both of these groups have been all the more reluctant to undertake extensive sales activities. This means in practice that a large segment of serviceable inventory is slated to be turned over to the designated disposal agencies. However, with a flood of material being received, the disposal agencies have tended to discourage further receipts and often have been slow to provide shipping instructions.[61] This in turn has placed the contracting agencies in the position of either making arrangements to store serviceable inventory with contractors in possession or acquiring other warehouse space so as not to delay termination settlements.

These difficulties of disposing of serviceable property, together with the evident desires of disposal agency liaison consultants to avoid overburdening the disposal agencies with property of doubtful serviceability, quickly produce a tendency for contracting agencies to find that inventory is unserviceable. This inclination appears to be given official sanction by the provision of Surplus Property Board Regulation No. 9 that "unless property affirmatively appears to be serviceable, it shall be considered to be unserviceable."[62] Although this regulation states that unserviceable property

[60] Surplus Property Board Regulation No. 9, contained in Joint Termination Regulation (8-10-45) p. 3020 (§ 8309.12).

[61] Surplus Property Board Regulation No. 1—Special Order No. 5 (May 1, 1945), CCH Surplus Disposal Law Reporter p. 4107.

[62] Surplus Property Board Regulation No. 9, contained in Joint Termination Regulation (8-10-45) p. 3023 (§ 8309.11).

means "property that has no reasonable prospect of sale for use," it does not specify whether the test shall be an objective fair sampling of the market or a determination based upon the knowledge of administrative officials. The pressures for speed have favored the latter approach. These pressures have also largely ruled out salvaging operations necessary to separate serviceable components from the residual scrap—even though the components may have a sales value substantially in excess of the scrap value of the assembled units and the salvaging costs.

Accompanying the leaning to declare inventory unserviceable is a propensity to dispose of such property as scrap. Regulations provide that (most) sales of unserviceable property "shall be made on the basis of adequate competitive bidding."[63] As a practical matter, bids for this property are promptly entered by scrap and used machinery dealers, while other classes of purchasers are either difficult to reach or slow to present quotations. This limited nature of the market to some extent has been fostered by the previously noted circumstances that contracting agencies have not maintained their former contacts with other prospective purchasers, and contractors in possession have only restricted knowledge of prospective markets for such property. In this narrow market bids for unserviceable property tend to approximate current scrap prices. With differentials over and above scrap levels being so small, contracting agencies have been inclined to permit sales to fall into the scrap category so that the agencies gain protection through requesting scrap warranties. Although regulations do not require the execution of a scrap warranty where competitive bids have been secured, the Chicago Ordnance District, like many other contracting agencies, asks for the warranty in almost all sales at scrap prices.

The last step in the sequence affecting the use of scrap warranties is for contracting agencies to expedite sales of unserviceable property through eliminating time-consuming competitive bidding and substituting sales by negotiation. Regulations prescribe that in exceptional cases the requirement of competitive bidding may be waived where it "would be in the best interests of the Government" to dispose of unserviceable property by negotiated sale at the best price obtainable—provided the buyer furnishes a scrap warranty.[64] To date a wide variety of circumstances have provided justification for such negotiated sales.

Thus, the cumulative tendencies act to funnel a large portion of termination inventories under the continuing obligations of the scrap warranty.

[63] Ibid.

[64] Joint Termination Regulation (8-10-45) para. 445.5 and 446.3.

The essence of the obligation imposed by the scrap warranty is that the property purchased by the warrantor cannot be sold, shipped, or used by him other than as scrap. This obligation, running directly to the Government, is unlimited in time but does not extend to subsequent purchasers. Unlike the irrevocable consequences of mutilating material to secure protection against resales for other than scrap uses at unconscionable profits, the warrantor may divert the property to more economic uses upon securing a release of the warranty. This release may be obtained from the Government by payment to the Government of the difference between the amount for which the property was purchased as scrap and its present value for use other than scrap. Relatively few releases have been sought from the Chicago Ordnance District to date. In part this may be explained by the fact that a large share of purchases under warranty have been made by scrap dealers who under pressure usually channelled their entire stock to industrial consumers of scrap. But with the end of the war and more classes of items in termination inventories being sold as scrap under warranty, the efforts to reclaim serviceable components for use other than scrap may increase.

Breach of the scrap warranty certainly is remediable by usual contract damages, and it appears that the violator may also incur civil or criminal penalties. Contract damages, measured by the amount required to secure a release of the warranty from the Government, would be recoverable regardless of the circumstances surrounding the breach. If the breach were intentional, appropriate punitive damages might be added into the assessment. It seems, however, that criminal punishment could not be administered unless the warrantor possessed a fraudulent intent at the time of executing the warranty.[65] Likewise, the quasi-criminal penalties prescribed in section 19(c) of the Contract Settlement Act appear appropriate only if the warrantor intentionally misrepresented his purposes in accomplishing the warranty.

As a practical matter the policing and enforcement of either the civil or the criminal liability would be difficult. Contracting agencies at the present time are making no effort to police scrap warranties. While in a number of cases responsible purchasers have secured releases of the scrap warranty, other buyers, either intentionally or unintentionally, may have overlooked this precaution. It is conceivable that some agency may be delegated the task of policing these warranties in the postwar period. That this job will be onerous, and probably fruitless in proportion to the expense involved, is almost a certainty. But it is likewise almost a cer-

[65] 52 Stat. 197 (1938), 18 U.S.C.A. § 80 (Supp. 1944).

tainty that a few scandalous violations of the scrap warranty will come to light, and the warrantors guilty of making exorbitant profits on items purchased as scrap may be subjected to litigation accompanied by distasteful publicity.

The second new issue frequently created by disposition of termination inventory concerns the so-called "use representation," which currently takes the following form:

> The undersigned represents to the United States that the material covered by this agreement is retained or purchased by him for his manufacturing, construction, maintenance, or repair purposes and that he intends to use or consume the material for said purposes, and that he is not retaining or purchasing the material with the intention of reselling it in its existing form at a profit.[66]

This representation is a by-product of the national policy of encouraging contractors to retain their termination inventories for use. Such retentions keep inventories from becoming additional excess goods awaiting an ultimate user, and also eliminate costly and burdensome transportation and warehousing activities. From the standpoint of the national economy, retention for use probably is the most desirable form of disposition.

Being so advantageous, the Surplus Property Board has provided that a retention for use may be made at the best price obtainable without resorting to advertising or the securing of competitive bids.[67] In practice, the determination of what is the best price obtainable is usually based upon either a sampling of the market or the judgment of personnel in the contracting agencies. With respect to many classes of items, the disposal personnel have, through past experience in redistribution work, built up standards representing their appraisals of going market prices. To a large degree "best price obtainable" has come to mean a price not unreasonably lower than these standards. The use representation, in effect, is the authorization to apply such standards rather than the more rigorous test furnished by active bidding in an open market.

The drive for speedy termination settlements, limiting the time for inventory dispositions by contractors, has caused contracting agencies to

[66] Joint Termination Regulation (8–10–45) para. 411.19. Prior to mid-year 1945, the standard use representation required by the Chicago Ordnance District was as follows: "The purchaser represents and warrants to the United States that he will use or consume this property in the United States for manufacturing, construction, maintenance, or repair purposes and agrees that if he does not so use or consume it that he will not resell it at a profit." This clause creates rights and obligations similar to those under the current scrap warranty. The change over to the less stringent present form of use representation served to encourage retentions for use. Inasmuch as contractors sometimes are uncertain regarding the type and extent of the use to which inventory can be put, there was reluctance to make continuing commitments as to use.

[67] Surplus Property Board Regulation No. 9, contained in Joint Termination Regulation (8–10–45) p. 3022 (sec. 8309.8).

encourage contractors to retain inventories subject to use representations.[68] These retentions may be arranged quickly without time consuming advertising and competitive bidding. Moreover, since retentions for use are at the best price obtainable, the contracting agency is not required to determine formally whether the retained property is serviceable or unserviceable.[69] The additional voluminous paper work attendant upon storage or shipment of the property is also avoided. On top of all these advantages is the consideration that the contracting agency runs little risk of being accused of sacrificing the inventory at an unconscionably low price. Specifically, since the retention is for *use*, there should be no subsequent resale of the property at a scandalous profit.

If there is any undesirable effect of excessive speed in connection with retentions for use, it is that contracting agencies might become careless in comparing retention offers with prices obtainable on the open market. Looseness of this nature, however, is not apt to be demonstrated except in regard to commodities for which there are established markets or recognized trade quotations. By the same token, it is on these articles that contracting agencies will have the most accurate price information. Whatever looseness results from speed probably will occur in retentions of nonstandard items; for these, ascertainment of the actual best price obtainable would require a broad canvas of potential markets.

Chicago Ordnance District contractors have retained millions of dollars worth of inventory under use representations, and, like scrap warranties, no effort has been made to police these representations. Questions have been raised as to the duration of the obligations imposed upon contractors by use representations. In contrast to the scrap warranty, the use representation purports to relate only to the intention of the contractor at the moment of executing the representation. Construed strictly, the representation apparently would not preclude the giver from changing his mind and deciding to sell the retained material at a profit any time after making the representation. Some latitude seemingly was intended in so far as no procedure has been authorized for procuring the release of a use representation. Established manufacturers should encounter no difficulties in later deciding to sell at a profit the property they retained subject to a use representation; but "war babies" continued for the purpose of speculating in war surpluses may face trouble in proving their good faith under otherwise similar circumstances.

[68] It should also be observed that the very existence of the use warranty device in part stemmed from the desire for speedy termination settlements.

[69] Joint Termination Regulation (8-10-45) para. 445.3.

The third open issue related to disposition of termination inventories concerns storage agreements in which the contractor agrees to store at his plant inventory which he has conveyed to the Government as part of the settlement. In this way the contracting agencies may be relieved of having to store the property elsewhere. This arrangement eliminates unnecessary transportation, and may alleviate overcrowding in Government warehouses while the military establishment decides whether it requires the material or until the disposal agencies are ready to make space available.

To date all such storage agreements executed by the Chicago Ordnance District have been substantially the same as warehouse arrangements made with third parties not having terminated contracts. As of the time when these agreements are executed, no questions relating to compensation of the contractor for having acquired the property for war production, or disposal credits in favor of the Government, or transfer of title to the Government, remain open with respect to the property covered. The issues which do arise after settlement involve the liability of the contractor for shortages from the quantities stated in the agreements. These stated quantities are based upon the check of inventories which is part of the termination settlement—and these checks are generally upon a selective basis. The storage agreements permit variances within "commercial tolerances," but the inaccuracies of the selective check may result in discrepancies which exceed normal commercial tolerances and thus cause the quantities stated in the storage agreement to be erroneous. Often in a case of this nature it is difficult to determine whether or not the shortage was caused by the contractor's failure to exercise the standard of care required by the storage agreement. Upon the resolution of this question rests the determination of the contractor's liability.[79]

Despite the difficulties of administering these storage agreements (and the added clerical work entailed in their preparation), contracting agencies might have to make wholesale use of them in order to avoid delaying settlements of the mass V-J Day terminations. A storage agreement with a contractor is a stop-gap controlling the rights of the parties as to termi-

[79] Ibid. (4–20–45) para. 972.2. Records of the Chicago Ordnance District through September 15, 1945 show that in at least 28 cases shortages of inventory held by contractors under storage agreements exceeded the "tolerance constituting reasonable limits in accordance with good commercial inventory practice."

Where the termination inventory placed in storage exceeds the quantities stated in the storage agreement, the Government nevertheless may assert title to the "overage" by virtue of the termination settlement agreement relating to the inventory.

nation inventory during the period between the date a termination settlement is concluded and the date on which the last item of termination inventory is removed from the contractor's plant. In essence, storage agreements fill the gap left when the speed of settlements outstrips the rate of plant clearances. Should any factor retard clearances—as, for example, inability of the designated disposal agencies to provide shipping instructions—contracting agencies probably will urge storage arrangements upon contractors. As settlement speed increases and Government warehouses are filled, the task of promptly clearing plants becomes more aggravated and there may be a corresponding enlargement in the use of storage agreements. If the speed of settlements precludes extensive prior selective verification of termination inventories by Government personnel, the administration of these storage agreements might involve many complexities in determining the liability of contractors for inventory discrepancies later discovered.

The repeated references which have been made in this section to the pressures for speed in settling terminations might leave the impression that contractors have taken the lead in pressing for this speed. The fact is, however, that since V-J Day the Government has been the primary sponsor of an accelerated settlement pace in order to facilitate reconversion.[71] It is obviously advantageous to both the Government and contractors that settlements be completed before the services of experienced Government personnel are lost through the demobilization process. To conform with the national policy, after victory over Japan many contracting agencies speeded up the wartime settlement tempo by means of master timetables which scheduled certain numbers of terminations to be closed during each of the last four calendar months of 1945. These schedules were not predicated upon the actual receipt of inventory submissions or plant clearance requests from contractors; consequently, to the extent that contractors are slow in furnishing inventory lists, the task of the contracting agencies becomes more difficult. First returns in the Chicago Ordnance District have indicated how the monthly target system has expedited closures. Legal details, for example, are not permitted to consume time; and in order to equal or better the "bogey" for a given month it may be necessary to complete the preparation and execution of numerous settlement contracts in the last few days of the period. The fertility of the control plan is reflected in the figures that, of 309 settlement agreements reduced to definitive instruments by the Legal Division of the District dur-

[71] See Army Service Forces Circular No. 338, September 7, 1945.

ing September, 1945, 206 were written and executed in the last seven working days of the month![71a]

EXTRAORDINARY RELIEF, MISTAKES, AND FRAUD

While a large portion of war contractors are concerned in termination proceedings with Government-owned facilities, subcontracts, and inventories, relatively few, fortunately, are troubled with situations involving fraud, mistakes, or need for extraordinary relief related to contract terminations. These latter matters, however, can be expected to follow in the train of a large war-procurement program. Although they have arisen to some extent during the war, by their very nature they are primarily part of the aftermath. Speedy termination settlements may affect the solution of the extraordinary relief cases and possibly increase the number of mistake and fraud situations.

During the war, contractors grew to look upon the contracting agencies as "benevolent partners" in their wartime ventures. In large measure this attitude was fostered by the prevalence of well-cushioned profit margins and, in the infrequent cases where unanticipated risks narrowed these margins or threatened losses, by the availability of extraordinary relief under the First War Powers Act and Executive Order 9001. Within a week after V-J Day this form of special relief was largely cut off, but the provisions of section 17 of the Contract Settlement Act continued to provide a means of redress in cases where contractors had done work in reliance upon apparent authority of Government agents without having secured the coverage of binding written contracts.[72] Although contractors had become acquainted with extraordinary relief during the war, the mass contract terminations at the cessation of hostilities acted to focus attention upon the relationship between terminations and requests for special relief.

At the present time there are pending in the Chicago Ordnance District a number of cases for relief in connection with terminated contracts. The requested relief is of the type which may be granted under section 17 of the Contract Settlement Act, or which previously could have been provided under Executive Order 9001. The contracting agencies have been advised that their discretion does not authorize lumping adjustments of such pleas for special relief into negotiated termination settlements. As a practical

[71a] The figures for November, 1945, which became available after the text of this article was prepared, are even more impressive. Of 341 settlement agreements executed, 104 were signed the last day of the month!

[72] For a discussion of relief under Executive Order 9001 and section 17 of the Contract Settlement Act see Kramer, Extraordinary Relief for War Contractors, 93 Univ. of Pa. L. Rev. 357 (1945).

matter some contractors may be willing to forego their requests for extraordinary relief, especially if the sum involved is small, in order to expedite the closure of the termination settlements. There appears to be no objection to this procedure so long as withdrawal of the request is not reflected by an increase in the amount paid to the contractor in the settlement. A larger group of contractors, on the other hand, have indicated an unwillingness to drop their requests for special relief without securing something in return. These contractors in all probability will insist upon either postponing settlement of the terminations or expressly reserving from settlements the possibility of obtaining relief through future private or public legislation, subsequent administrative measures, or court action.

An interesting illustration of the existing special relief cases is furnished by a situation resulting from the sudden across-the-board V-J Day terminations. While in the usual case the basis of the request for extraordinary relief does not arise out of a termination, the slash in the procurement program on V-J Day caught some contractors short because of their wartime practice of proceeding without adequate written authority. For example, two of the largest contractors doing business with the Chicago Ordnance District had been producing under (informal) letter orders stating the total quantity of items to be manufactured but placing a ceiling on the amount of money the contractors were authorized to expend or obligate prior to the execution of formal contracts. In each case the contractor had incurred costs exceeding the specified limit, and with the V-J Day cut-off authority was lacking to increase the ceiling or execute a formal contract. Immediately, pleas for special relief under section 17 of the Contract Settlement Act were submitted. To a large extent these pleas rest upon the tacit wartime understanding that contractors having letter orders will proceed to produce the quantities required and that paper work adjusting fund allocations will catch up. V-J Day terminations brought a sudden realization to these contractors of the technical limitations of letter orders.

All of the various requests for special relief arising in connection with terminated contracts raise the question whether an unqualified mutual release in a settlement agreement forecloses the contractor from later obtaining such relief. The standard release specifically covers "all rights and liabilities of the parties *under* the contract and under the [Contract Settlement] Act, in so far as it *pertains to* the contract." Inasmuch as special relief is concerned with payments to which the contractor is not entitled under the terms of his contract, it may be contended that all payments by way of special relief do not arise *under* the contract, but only in *con-*

nection with it. Moreover, adopting this view, it further may be urged that special relief under section 17 of the act is a matter pertaining to the contract only *collaterally*. Applying this construction, the release may not preclude asserting a plea for extraordinary relief. This approach, however, seems unrealistically narrow in the light of commonly understood termination-settlement procedures. All signs indicate that contractors and contracting agencies consider a settlement agreement as winding up all unreserved rights and obligations whether arising under or only in connection with the terminated contract. Since the granting of extraordinary relief by the Government should rest upon a realistic basis, it is believed that this broader construction of the mutual release is to be preferred.[73]

The occurrence of mistakes in termination settlements and agreements bears a close relationship to speed in settling contracts. The most common types of mistakes—clerical errors in settlement agreements and other failures of such instruments to express the "true agreement between the parties"—are much more apt to arise under pressure to prepare instruments within short deadlines.[74] During September, 1945, for example, in three cases settlement contracts written by the Chicago Ordnance District contained minor deviations from the agreement reached by the parties at the conclusion of negotiations. In relation to the total number of settlement agreements drafted, these intra-agency mistakes far exceeded the percentage of similar mistakes in any previous period. Sometimes errors of this nature are easily detected and corrections merely cause contractors and contracting agencies annoyance and added paper work. On other occasions, where the record of negotiations is not complete or clear, considerable time and investigation are required to ascertain the facts and make certain that the settlement instrument actually does fail to reflect accurately the negotiated agreement. In any event, a mistake in the written agreement might result in delaying payment of the contractor's termination claim in full until the error has been rectified.

Another class of mistakes which regulations provide may be corrected by the contracting agencies is designated as being composed of "mutual mistakes as to material facts." Regulations specifically exclude from this category errors consisting of the "failure of a contractor to present or to present accurately, and of the Government to allow, a claim based on a cost incurred by the contractor or on a liability to which the contractor

[73] Of course, claims under section 17a of the Contract Settlement Act may arise apart from any written contract between the Government and the claimant. This is also true in the case of instructions for continued production beyond the quantity specified in an existing written contract between the parties.

[74] See Joint Termination Regulation (10-11-45) para. 748.3(1)(c).

was subject, whether by reason of ignorance of such cost or liability or of its extent or for any other reasons."[75] As so defined, this mutual mistake concept would seem to have a very limited application. It is difficult to conceive of a mutual mistake of fact to the detriment of the contractor which would arise for reasons *other* than his failure "to present or to present accurately" a claim. On the other hand, there is no need for specific authority to permit the correction of a mutual mistake of fact which is to the detriment of the Government. Errors of this kind are correctible by contracting agencies under their broader power to amend any settlement agreement so as to benefit the Government.[76]

Mistakes consisting of the "failure of a contractor to present or present accurately" a claim for his costs or liabilities pose a problem which goes to the very foundation of the concept of final settlements of terminated contracts. To allow carte blanche reopening of settlements to correct any such error would mean that every settlement potentially was partial and tentative. To bar entirely the reopening of settlements in these cases would entail working a severe hardship on contractors even under circumstances where the equities are heavily in their favor. Consequently, a compromise has had to be worked out. A contractor's omission may be rectified only with the approval of the top administrative body of the service involved. These organizations have adopted the policy that a contractor's failure to present, or to present accurately, a claim will be repaired only in a very limited class of cases. A positive commitment of granting relief has been given only where "it clearly appears that a contractor has been misled to his substantial detriment by actions of Government personnel on which he is entitled to rely." Otherwise settlements will be reopened "only in the most unusual cases."[77]

Attempts may be made by contractors to predicate the reopening of final settlement agreements upon the "mistakes" of contracting agencies in refusing to allow certain components of the contractors' claims. It might be asserted, for example, that the contracting agency arbitrarily rejected an item in the claim, perhaps by virtue of an error in applying regulations. Such circumstances, even if demonstrated, cannot be considered as infusing a *mistake* into the settlement agreed to by the parties and formalized in an executed instrument. Regardless of whether the con-

[75] Ibid.

[76] Ibid, para. 748.3(1)(a).

[77] Ibid, para. 748.2. "Adoption of any other policy would cause administrative confusion, would greatly impair the utility of the negotiated settlement, and would violate the statutory objective of finality of settlements."

tracting agency ruled correctly on the disputed element of the claim, the contractor accepted its decision and carried the settlement through to completion. The contractor cannot be heard to complain later about the ruling on any isolated issue which formed part of a negotiated settlement, inasmuch as the entire "deal" must be considered as a whole and strictness in one aspect may have been offset by liberality in another. If the contractor felt aggrieved over the strict ruling, he should have objected—and protected his rights—before signing the settlement agreement.

While mistakes in settlements are part of the more immediate aftermath of contract terminations, frauds in settlements are likely to be aspects arising out of later, after-the-fact, investigations. For that reason, a full discussion of fraud must await the judgments of hindsight in whatever climate of opinion then exists. At present, based on facts already uncovered, it can only be said that few, if any, termination settlements have been tainted with actual fraud. None as yet has been turned up in the Chicago Ordnance District, and apparently this condition is representative. The Director of Contract Settlements on October 11, 1945, stated publicly that: "The fact is that, except for a few small borderline cases, weeded out by the contracting agencies, shyster claims just have not existed."

This is not to be construed, however, as meaning that subsequent appraisals of settlements will give contracting agencies a clean record. Already legislative investigating groups and the General Accounting Office are probing into closed terminations. In the Chicago Ordnance District alone an average day finds five representatives of the General Accounting Office reviewing settlement files. As was the case after World War I, these investigations probably will turn up very few situations involving actual fraud.[78] But who can predict whether the reviewers, following the precedent after World War I, will shout that the contracting agencies made hasty settlements involving unconscionable waste of public funds?[79]

[78] For a summary of developments at the end of the last War, see Gromfine and Edwards, Terminations after World War I, 10 Law and Contemporary Problems 563, at 588 (1944).

[79] Perhaps a glimpse into the future and an indication of the ease with which wartime liberality may be confused with illegality is provided by the following excerpts from Hearings before Subcommittee No. 3 of the House Committee of the Judiciary on H. R. 4789 and S.1718, 78th Cong., 2d Sess., at 198, 209 and 210:

"Mr. Warren. [Comptroller General] Well, the whole question is one of such magnitude. There have been so many illegal approvals made under these [cost-plus-a-fixed-fee] contracts, and there has been such laxity on the part of contracting officers, aided and abetted by those in authority in the departments. That is why I say that there should be some final check.

. . . . . .

"Mr. Bates. You made incriminating statements about the efforts to have these payments made illegally. You followed that up by making the further statement that the tragedy of all

Though such attacks will be irritating to termination officials and may be embarrassing to contractors, the Contract Settlement Act provides that settlements shall be "final and conclusive except . . . . for fraud." Regardless of its liberality, a criticized settlement apparently can be upset through court action only upon presentation of evidence that it was induced by or tainted with fraud.

To the extent this analysis serves to focus attention on generally unnoticed aspects of termination procedures it may assist in avoiding or disposing of the most common loose ends in settlements. While a number of the ramifications have been explored, the passage of time alone will completely reveal the gamut of reserved problems, ancillary negotiations, and time-consuming controversies which will follow in the wake of speedy termination settlements.

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this is that apparently it is something that nobody cares anything about. Do you mean to intimate that high-ranking officials in the Government service, having charge of these administrative orders, care nothing about these illegal acts?

. . . . . .

"Mr. Warren. Oh now, I am afraid you are getting me wrong.

"Mr. Bates. You say there is apparently nobody who cares about the waste, illegal expenditures, and approval of bills, and that you are met with a shrug of the shoulders. What other intimations do you want to leave with the committee?

"Mr. Warren. Frankly, I do not know if anybody cares anything about it.

"Mr. Bates. Then, they are satisfied with corruption and waste?

"Mr. Warren. No; I would not and do not say corruption.

"Mr. Bates. Illegal payments?

"Mr. Warren. I said extravagance and waste.

"Mr. Bates. And illegal payments?

"Mr. Warren. Extreme liberality."

U. OF ILL. LIB.

CONSTITUTIONALITY OF PARTY-CIRCLE BILLS

KENNETH C. SEARS*

THE Sixty-fourth General Assembly of Illinois passed the long-debated party-circle bills applicable in fact only to an amendment of Section 2 of Article XIV of the Illinois constitution. The vote in the Senate was 40 to 1; in the House, 127 to 3. Attorney-General Barrett delivered two opinions to Governor Green that these bills were unconstitutional. Despite the fact that the veto message of the Governor, relying in part upon the Attorney-General's opinion, stated that a "copy of his opinion is on file in my office for the inspection of any interested citizen," the Attorney-General's office refused to send to the writer a copy of his opinions. It was claimed that his opinions to the Governor were confidential. At the time this claim was made, a portion of the opinions had already been printed in the *Chicago Tribune*.[1] However, a copy of the Attorney-General's opinions was secured through the kindness of John William Chapman, Secretary to Governor Green. The Attorney-General was notified that his opinions would be reviewed by the writer and that it would be assumed that the copy of his opinions received from Mr. Chapman was correct unless the Attorney-General sent a copy from his office. There was no answer to this letter, and here are the opinions of the Attorney-General:

SENATE BILL 514

64TH GENERAL ASSEMBLY

TO THE GOVERNOR:

At your request, I have examined, as to its form and constitutionality, Senate Bill No. 514 enacted by the Sixty-fourth General Assembly, being an Act entitled,

An Act in relation to resolutions adopted by political parties with reference to proposed amendments to the Constitution of the State to be submitted prior to January 1, 1947.

This is a companion Bill to Senate Bill 516.

This Bill authorizes political parties, prior to January 1, 1947, to adopt a resolution either for or against any proposed amendment to the constitution of the State and forward a certified copy thereof to the Secretary of State. The Secretary of State is authorized to certify such resolution to the county clerk of each county in the State, and the county clerk is authorized in the printing of the ballots to have the proposed amendment printed under the political party appellation.

This Bill is a part of the plan to permit a vote in the party circle to be counted as a

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[1] Friday, July 27, 1945.

vote for the proposed constitutional amendment, if the political party has by resolution approved the proposed constitutional amendment at its convention.

In my opinion to you on Senate Bill No. 516, as of this date, I held said Bill to be unconstitutional and void. The reasons therein stated apply with equal force to this Bill, which I also hold to be in conflict with Article XIV, Section 2 of the Constitution.

I am therefore returning herewith, Senate Bill No. 514 without my approval.

[*Signed*] GEORGE F. BARRETT
Attorney General

SENATE BILL NO. 516
64TH GENERAL ASSEMBLY

TO THE GOVERNOR:

At your request, I have examined, as to its form and constitutionality, Senate Bill No. 516 enacted by the Sixty-fourth General Assembly, being an Act entitled,

> An Act to amend Sections 16–6 and 17–11 of
> An Act concerning election, approved
> May 11, 1943, as amended.

This Bill proposes to change the method of voting upon a constitutional amendment submitted to referendum prior to January 1, 1947. It permits the printing of a proposition on the ballot, either for or against the adoption of a constitutional amendment, under the party appellation or title and following the names of the candidates of the political party, in case such political party, at its convention, has adopted a resolution favoring or opposing the amendment. The Bill provides that a vote in the party circle shall be counted as a vote for or against the proposed constitutional amendment, as the case may be, depending upon the resolution of the political party as evidenced by the positive or negative form of the proposition appearing in the party column.

The method prescribed for amending the Illinois Constitution, other than by a constitutional convention, is set forth in Section 2, Article XIV of the Illinois Constitution as follows:

> Amendments to this Constitution may be proposed in either House of the General Assembly, and if the same shall be voted for by two-thirds of all the members elected to each of the two houses, such proposed amendments, together with the yeas and nays of each house thereon, shall be entered in full on their respective journals; and said amendments shall be submitted to the electors of this State for adoption or rejection, at the next election of members of the General Assembly, in such manner as may be prescribed by law. The proposed amendments shall be published in full at least three months preceding the election, and if a majority of the electors voting at said election shall vote for the proposed amendments, they shall become a part of this Constitution. But the General Assembly shall have no power to propose amendments to more than one article of this Constitution at the same session, nor to the same article oftener than once in four years.

In order to determine the validity of Senate Bill 516, it becomes necessary to ascertain the intention of the framers of the Constitution as disclosed by the language of Section 2, Article XIV. This section of the Constitution requires that a proposed amendment to the Constitution be submitted to the voters for adoption or rejection "in such manner as may be prescribed by law." However, this language is followed by the qualifying proviso that in order for the proposed amendment to become part of our

basic law a majority of the electors voting at the election must "vote for the proposed amendment."

The usual and customary manner of voting for or against a proposition is a direct vote on the proposition itself—a direct expression of affirmation or negation—a signification of "yes" or "no" in reply to the stated proposition. The object of an election is to obtain and record a correct expression of the will of the voter. *Pierce* v. *The People*, 197 Ill. 432. By means of direct affirmative votes, the people of Illinois have amended the Constitution of 1870 on seven separate and distinct occasions and propositions.

The question of the constitutionality of Senate Bill 516 resolves itself into the question of whether or not the framers of our Constitution could have contemplated the substitution of the indirection proposed in Senate Bill 516 for the time honored and proven custom of direct expression of the will of the voter.

The fundamental and basic rule governing the construction of constitutional provisions, as stated by our Supreme Court in *American Breeders' Ass'n* v. *Fullerton*, 325 Ill. 323, is as follows:

> . . . . The rules of constitutional and statutory construction are the same, (*People* v. *Hutchinson*, 172 Ill. 486) and the object in each case is to arrive at the intention expressed by the language used in view of conditions existing at the time of its use. . . . .

The meaning and intention of the language of Section 2 of Article XIV must, therefore, be determined in the light of the conditions existing at the time of its use.

Our present Constitution was drafted and adopted in 1870. A brief resume of the Illinois laws governing the manner of voting, commencing with the admission of Illinois to the Union in 1818, will aid in ascertaining the intention the Constitutional Convention of 1870 sought to express in Section 2, Article XIV.

Section 28, Article II of the Illinois Constitution of 1818 provided as follows: "All votes shall be given *viva voce* until altered by the general assembly."

The first general election law of Illinois was enacted by the Second General Assembly in 1821. This enactment (Laws of Illinois, 1821, page 74) provided as follows:

> *Be it further enacted*, That the manner of voting shall be by the elector's approaching the bar in the election room at any time when the poll of the election is open, and addressing the judges of the election in his proper person, and with an audible voice, to be heard by the judges and poll keepers, to mention by name the persons he intends to vote for to fill the different offices which are to be filled at the said election; and the poll keepers shall enter his name and vote accordingly, and then he shall withdraw.

In 1829, (Laws of 1829, page 54), the provision of the 1821 Act above quoted was reenacted with an addition thereto, reading as follows:

> . . . . *Provided*, that a voter may vote by presenting an open ticket to the judges, containing the names of the persons for whom he votes, and the offices; and the said judges shall read the same to the voter, and the clerks, with the assent of the voter, set the same down in their books, as in other cases.

In 1845, the foregoing provisions were superseded (Laws of 1845, page 217) by an enactment providing as follows:

> Electors shall vote, by first announcing their own names to the judges and clerks of the election, and then the names of the persons for whom they wish to vote; and the clerk shall enter their names and votes accordingly: *Provided*, That a voter may vote by presenting an open ticket to the judges, containing the names of the persons for whom he votes, and the offices; and the said judges shall read the same to the voter, and the clerks, with the assent of the voter, set the same down in their books, as in other cases.

It was not until the adoption of the Constitution of 1848 that voting by ballot was made mandatory. Section 2, Article VI of the Constitution of 1848 provided as follows: "All votes shall be given by ballot."

This provision was carried into the Constitution of 1870 as Section 2, Article VII.

The Laws of 1885 (Hurd's Revised Statutes 1885, page 535) contained the following provisions:

> The manner of voting shall be by ballot. The ballot shall be printed or written, or partly printed and partly written, upon plain paper, with the names of each candidate voted for, and the title of the offices. When the ballot is printed, the same shall be printed upon plain paper, in plain type, in straight lines, with a blank space below each name, of a width not less than equal to the width of the line in which the name is printed.
>
> The names of all candidates for which the elector intends to vote shall be written or printed upon the same ballot, and the office to which he desires each to be elected shall be designated upon the ballot.

With the advent of the use of tickets in 1829, the "party ticket" came into being. However, there were no provisions permitting "party circle" voting and no official ballots provided at public expense. Each voter made up his own "ticket" or used a printed one furnished by the political party.

It was not until the enactment of the Illinois Ballot Act in 1891 that official ballots were furnished at public expense. The Act of 1891 incorporated the secrecy of the Australian Ballot system with provisions which, for the first time in Illinois, recognized and permitted "party circle" voting.

The foregoing historical resume demonstrates that at the time of the adoption of the Constitution of 1870 'party circle' voting was unknown in Illinois. It is obvious that the framers of the Constitution of 1870 could not have contemplated that the language used in Section 2 of Article XIV would permit the casting of votes on constitutional amendments by means of the "party circle" device. At the time Section 2 of Article XIV was adopted, the only known method of voting upon a proposition was that by which the voter directly signified his intention upon the precise question through an affirmative or negative vote upon that question.

It appears clear to me that it was the intention of the framers of the Constitution of 1870 that an elector, in voting for or against a constitutional amendment, would be required to signify his intention by directly marking his ballot either for or against the proposition.

The provisions of Senate Bill 516 and its companion measure Senate Bill No. 514 constitute a vicious, craftily conceived scheme designed to confuse and ensnare the electors. These provisions contrive to mislead the voter and to cause him to unwittingly and inadvertently cast a vote he did not intend. These Bills attempt to legalize the perpetration of this fraud and deception. They also seek to substitute the desires of a political party for the considered judgment of the voter on the important issue of changes in our basic law. These Bills strike a foul blow at the freedom and integrity of the ballot. They embody a stratagem which reeks with the savor of machine politics and would substitute the dictates of party conclave for the independent appraisement of the individual elector. The preservation of our constitutional and representative processes of government demands that the franchise of the ballot be kept free from all such artifice and legerdemain. An honest ballot is the symbol of true and good republi-

can government. Deception and trickery in the elective process has been the tool of the dictatorships.

I have given careful thought, study and consideration to the method of voting which would be authorized by Senate Bills 514 and 516. It is my opinion that they clearly conflict with Section 2, Article XIV of the Illinois Constitution and are, therefore, unconstitutional and void.

For the foregoing reasons, I return Senate Bill No. 516 without my approval as to form or constitutionality.

[*Signed*] GEORGE F. BARRETT
Attorney General

THE FACTS

For the apparent purpose of demonstrating that Illinois voters prior to 1870 voted upon constitutional propositions directly (knowingly?) and not indirectly, the Attorney-General purported to make a "brief resume of the Illinois laws governing the manner of voting, commencing with the admission of Illinois to the Union in 1818," to "aid in ascertaining the intention the Constitutional Convention of 1870 sought to express in Section 2, Article XIV."[2]

After quoting the 1818 constitutional provision requiring viva voce voting, the Attorney-General quotes part of and states that "the first general election law of Illinois was enacted by the Second General Assembly in 1821." Not so! See "An Act regulating Elections," approved March 1, 1819.[3] Failure to quote Section 13 of this act may have been an oversight. Here it is:

Sect. 13. *And it be further enacted*, That at all elections hereafter to be held in this state, the electors shall vote by ballot. They shall bring their votes legibly written or printed, on a single piece of paper, with the names at full length, and the offices designated for which such votes are given.—Each ballot shall be folded in such a manner as to conceal from view, the names written thereon, and shall be delivered by the person offering to vote, to one of the judges of the election, who shall put the same into the ballot box, unless rejected as hereinafter provided for.

Section 13, just quoted, seems significant. It seems to conflict with the 1818 constitutional provision for viva voce voting. It may mean that the first Illinois General Assembly overlooked the constitutional provision. It may mean a dissatisfaction with viva voce voting and an attempt to provide for voting by ballots with at least a measure of secrecy. With ballot voting in existence, political parties could have printed the ballots, gener-

[2] The Attorney-General also stated: "The meaning and intention of the language of Section 2 of Article XIV must, therefore, be determined in the light of the conditions existing at the time of its use." The word "use" is curious. The correct word to express the rule is "adoption."

[3] Ill. Pub. L. (1819) pp. 90–100.

ally used, as early as 1819, instead of 1829 as asserted by Attorney-General Barrett. Furthermore, it appears to be obvious that under section 13 of the 1819 law a constitutional proposition could have been written or printed in the affirmative any place on the ballot, and it would have been a vote for the proposition unless the voter was careful to read his entire ballot and then cancel the proposition if he did not agree with it. That is "indirect" voting, Mr. Barrett. If the Attorney-General saw this 1819 statute he apparently decided to ignore it and to quote the very different provision in the 1821 law which better suited his purpose. If viva voce voting was strictly enforced under the 1821 law it would appear to have been impossible for an elector to vote on a constitutional proposition without expressing his intention of doing so.

The Attorney-General overlooked, perhaps, another election statute, that of January 3, 1823.[4] It expressly repealed the two preceding acts regulating elections, and it returned to the ballot system of voting set forth in the 1819 act. The only material change appears to be with reference to an elector who voted in a precinct "where he is not entitled to vote for all the officers to be chosen at such election." Such an elector "shall present to the judges of the election an open ballot, in order that they may be satisfied that such elector has confined his vote to the officers for whom he is entitled to vote."[5] This 1823 statute was in opposition to viva voce voting, and again "indirect" voting on constitutional propositions became possible in Illinois.

Apparently the next election act in Illinois is found in the Revised Code of Laws for 1828–29.[6] The first part of section 10 of this act is almost the same as the 1821 provision for viva voce voting; but the proviso clause states that "a voter may vote by presenting an open ticket to the judges" who are required to "read the same to the voter." Thus, it is clear that under the 1818 Constitution the General Assembly oscillated beween ballot voting and viva voce voting, and apparently settled upon a compromise that was essentially viva voce voting if the later statutes were strictly enforced.[7]

Section 15 of the Revised Statutes of 1845 contained the essence of the previous revision of 1829.[8] Then came the Constitution of 1848 which omitted the 1818 provision concerning viva voce voting and provided that "all votes shall be given by ballot."[9] After setting forth these two facts the

[4] Ill. Pub. L. (1822–23) pp. 53–68, §§ 3, 14.
[5] Ibid., § 3.
[6] Ill. Rev. C. L. (1829) pp. 54–68, particularly § 10; see also Ill. Rev. Stat. (1833) pp. 243–57.
[7] Ill. Rev. Stat. (1845) c. 37, § 15.
[8] Set forth in the Attorney-General's opinion, supra.
[9] Ill. Const. (1848) art. 6, § 2.

Attorney-General made a leap to the manner of voting provided by the Laws of 1885. Why did he ignore what was passed between the Constitutions of 1848 and 1870? Manifestly, this was the most important period if he really desired to ascertain the meaning of section 2 of Article XIV of the 1870 Constitution "in the light of the conditions existing at the time of its use [sic]."

If Mr. Barrett had looked at an act in force February 12, 1849,[10] he would have found that section 15 of the Revised Statutes of 1845, set forth in his opinion, was repealed, and in lieu of it there was enacted the following:

> Sec. 15. The method of voting shall be by ballot, which ballot shall be folded by the voter and delivered to one of the judges or board of election, who shall, without unfolding or opening the same in any manner, deposit the said ballot in the said ballot-box; *Provided*, that no ballot shall be received or counted unless the same is written or printed upon white paper, without any marks or figures thereon, intended to distinguish one ballot from another.

Thus it is clear that viva voce voting was at an end and that secrecy was sought. With a secret ballot in effect, and with political parties long in existence with the privilege of printing party ballots, there was nothing to prevent parties from printing on their ballots only the affirmative of a constitutional proposition. If that occurred then the careless, ignorant, or unwary voter using such a ballot uncancelled would vote for the constitutional proposition even though he was unaware of that fact. That is what our Attorney-General designates as "indirect" voting. It was indulged in before 1891 and Mr. Barrett's specious distinction between party-ticket voting and party-circle voting will not fool any reasonably intelligent individual who cares to read the history of voting in this and other states. There was no party-circle voting before 1891 because parties with their party tickets needed no party-circle. For example, a particular group within the Democratic party in 1880 placed the Republican candidates for Governor and Secretary of State on its party ticket. Therefore, the Australian ballot law of 1891 was a reform law that more strictly regulated ballots, despite the concession that political parties could have their party circles.[11]

[10] Ill. Pub. L. (1849) p. 74, § 15.

[11] Ill. Pub. L. (1822–23) p. 180; Ill. Pub. L. (1851) p. 107; Ill. Pub. L. (1869) p. 96; Sears, Horse and Buggy Government, Chicago Sunday Times, p. 6M (April 30, 1939); Laughlin, A Study in Constitutional Rigidity, I., 10 Univ. Chi. L. Rev. 142 (1943); Sears and Laughlin, A Study in Constitutional Rigidity, II., 11 Univ. Chi. L. Rev. 374 (1944); Bogart and Mathews, Centennial History of Illinois 199.

The method of voting provided by the law of 1849 appears to have remained effective until the Constitution of 1870 was adopted.[13]

THE LAW

A legal opinion that an act of a legislature is unconstitutional is almost always supported by authority. But Attorney-General Barrett cites only two cases and these are cited only for general propositions that are acceptable. The cases cited are not pertinent to the solution of the question of the constitutionality of the party-circle bills. It is hardly possible that there is any case law in Illinois on this question because Illinois has never had a party-circle law for voting on constitutional propositions. Thus, the opinion of the Attorney-General is not supported by a single cited decision.

Of far greater importance, Barrett's opinion is contrary to Ohio and Nebraska cases which decided that party-circle statutes were constitutional.

Section 1, Article XVI of the Ohio Constitution of 1851 provided:[13]

> Either branch of the General Assembly may propose amendments to this constitution; and, if the same shall be agreed to, by three-fifths of the members elected to each House, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be published in at least one newspaper in each county of the State, where a newspaper is published, for six months preceding the next election for Senators and Representatives, at which time the same shall be submitted to the electors, for their approval or rejection; and if a majority of the electors, voting at such election, shall adopt such amendments, the same shall become a part of the Constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted, as to enable the electors to vote on each amendment separately.

In 1902 the Ohio legislature passed a party-circle bill applicable to constitutional amendments.[14] In a test case, the Ohio Supreme Court, without dissent, sustained the constitutionality of this party-circle law.[15] The problem for decision was set forth in this manner:

> The relator sets forth in his petition that, by certain joint resolutions passed by the general assembly of the state of Ohio, it was agreed to submit to the electors of the state of Ohio, on the first Tuesday after the first Monday of November, 1903, certain propositions to amend the constitution of the state of Ohio, which propositions are described in the petition. It is also alleged that under the act of the general assembly, passed May 2, 1902, entitled "An act to provide for the manner of submission of con-

[13] 1 Ill. St. 1818–1869 (Gross) c. 37, § 16. [13] Ohio Stat. (1853) p. 80.

[14] Ohio Acts (1902) p. 352. The significant sections of this law are set forth in Sears and Laughlin, op. cit. supra, note 11, at 399.

[15] State ex rel. Sheets v. Laylin, 69 Ohio St. 1, 68 N.E. 574 (1903).

stitutional amendments and other questions to a vote of the people" (95 O.L., 352), the republican and democratic parties of the state of Ohio, in convention assembled, took action in favor of the adoption of certain of such constitutional amendments, and also against the adoption of certain other constitutional amendments, and certified their action to the secretary of state in the manner provided for certifying nominations for state offices; and that the defendant, as secretary of state, pursuant to said act, is preparing, and is about to print such action of said parties, so certified to him, upon the official ballot for use at the election to be held on the first Tuesday after the first Monday of November, A.D. 1903, as part of the party ticket of each of said parties; and in all other respects in the preparation of such ballot and the placing of such constitutional amendments thereon, is complying with the requirements of the said act of May 2, 1902; and the relator alleges that the exercise by the defendant of any of the franchises, privileges, rights or powers sought to be conferred by said act is in contravention of the constitution of the state of Ohio, and prays that he be compelled to answer by what warrant or rights he claims to act in the preparation or arrangement of such ballot in the form aforesaid, and by what warrant or right he is about to have printed upon such ballot the action in favor of or against the adoption of such constitutional amendments by the parties aforesaid, and that upon the hearing hereof he be ousted from the rights, franchises and privileges so claimed. The defendant demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action.[16]

The solution of the problem did not appear to trouble the court, which rendered a brief opinion. The significant part of this opinion is quoted. Observe that the Ohio Supreme Court thought that a party-circle vote was an *express* method of voting on constitutional amendments.[17]

It was not the design or intention of the constitution to put a premium on ignorance or indifferentism at the same time that it is the duty of every citizen to inform himself and to vote upon every matter submitted to a vote of the people. Out of the proposition that a constitution adopted by the people can be amended only by a majority of the people, it naturally follows that of all the people voting at an election when an amendment to the constitution is submitted, only those should be counted for the amendment who expressly so vote, and this is the whole scope of article 16, section 1, of the constitution of Ohio.

The act of the general assembly entitled "An act to provide for the manner of submission of constitutional amendments and other questions to a vote of the people," passed May 2, 1902 (95 O.L., 352), enables the elector to vote with or against his party, on each or all of the amendments, or to vote separately upon each and every proposed amendment, or to not vote at all if he so desires. So far as we have been able to discover the act is not in any respect in conflict with the constitution, and not irreconcilably in conflict with the joint resolutions adopted by the general assembly submitting propositions to amend the constitution.

Demurrer to petition sustained and petition dismissed.[18]

[16] Ibid., at 2 and 575.

[17] Further information concerning Ohio is set forth in Sears and Laughlin, op. cit. supra, note 11, at 389.

[18] State ex rel. Sheets v. Laylin, 69 Ohio St. 1, 14, 68 N.E. 574, 575 (1903).

Perhaps the idea of the court was more tersely expressed by Attorney-General Sheets who appeared for relator. He said: "The act cannot be considered as an unreasonable infringement on the right of a voter to express his will untrammeled, for if it were, it would necessarily follow that the whole Australian method of voting would be an infringement on the right of suffrage, hence unconstitutional."[19]

Section 1 of Article XVII of the Nebraska constitution of 1875 provided:[20]

> Either branch of the legislature may propose amendments to this constitution, and if the same be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and published at least once each week in at least one newspaper in each county, where a newspaper is published, for three months immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection, and if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this constitition. When more than one amendment is submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately.

By a number of amendments of the existing statute governing elections, the Nebraska legislature adopted a party-circle law as to constitutional amendments.[21] An amendment adopted in 1906 with the assistance of this party-circle law was promptly challenged. But the Nebraska Supreme Court in a unanimous opinion decided that the amendment was valid.[22] The first two points considered by the court are of no importance here, but the third question was this: "Is there authority of law for counting for the constitutional amendment the straight party votes of the republican, democratic, and people's independent party?" In answering this question affirmatively, the court seemed at a loss to understand why any other answer could be seriously contemplated. The only problem considered was whether there was a violation of the not uncommon provision that: "When more than one amendment is submitted at the same election they shall be so submitted as to enable the electors to vote on each amendment separately." The court's solution of the problem was this:

> The objection that the provisions of our statute above quoted are not such "as to enable the electors to vote on each amendment separately," when several amendments

[19] State ex rel. Sheets v. Laylin, 69 Ohio St. 1, 3 (1903).

[20] Neb. Ann. Stat. (Cobbey's, 1911) p. 155. It will be observed that this section of the Nebraska constitution is very similar to the Ohio constitutional provision set forth above.

[21] Detailed information is set forth in State ex rel. Thompson v. Winnett, 78 Neb. 379, 110 N.W. 1113 (1907), and Sears and Laughlin op. cit. supra, note 11, at 383.

[22] State ex rel. Thompson v. Winnett, 78 Neb. 379, 110 N.W. 1113 (1907).

are submitted, appears to be without foundation. The voter may vote a straight party ticket if he desires, but he is not compelled to do so. He may vote a straight party ticket in general and make such exceptions as he desires either as to the individual candidates or as to any proposed constitutional amendment. The directions for so doing in the statute appear to be practicable and without uncertainty. It is not the duty of the court to suggest methods of submitting constitutional amendments to the vote of the people. The duty of devising and applying such methods is devolved upon the legislature, and, unless the method adopted by the legislature is manifestly a violation of the constitution, and unless it clearly appears that the method adopted by the legislature will not make it practicable for the voters to express their judgment as to each amendment proposed, the courts are not at liberty to disregard the will of the legislature. A similar method of submitting constitutional amendments has been upheld by the Supreme court of Ohio.[23]

The Ohio and Nebraska cases, as far as is known are the only ones that are strictly in point on the constitutionality of the party-circle bills passed by the Illinois General Assembly last June. Both of them are clearly contrary to the conclusion reached by Attorney-General Barrett. He ignored them, and it would seem that he did this because he could not satisfactorily differentiate them. Section 2 of Article XIV[24] of the Illinois Constitution is similar to the comparable provisions in the Ohio and Nebraska constitutions already quoted except that: (1) Illinois has no express provision requiring the separate submission of each amendment; (2) Illinois has a provision limiting the General Assembly to amendments to a single article at each session; and (3) Illinois, contrary to Ohio and Nebraska, expressly provides that amendments "shall be submitted to the electors of this State for adoption or rejection . . . . in such manner as may be prescribed by law." The party-circle bills were enacted in pursuance of this power to prescribe the manner of submitting amendments to the electors. There is no express limitation in section 2 of Article XIV on the "manner." But Attorney-General Barrett needed an implied limitation on this grant of power, and he proceeded to find one. He looked at the following sentence in section 2 which provides that amendments shall be-

[23] Ibid., at 394–95 and 1118.

[24] "Sec. 2. Amendments to this Constitution may be proposed in either House of the General Assembly, and if the same shall be voted for by two-thirds of all the members elected to each of the two houses, such proposed amendments, together with the yeas and nays of each house thereon, shall be entered in full on their respective journals, and said amendments shall be submitted to the electors of this State for adoption or rejection, at the next election of members of the General Assembly, in such manner as may be prescribed by law. The proposed amendments shall be published in full at least three months preceding the election, and if a majority of the electors voting at said election shall vote for the proposed amendments, they shall become a part of this Constitution. But the General Assembly shall have no power to propose amendments to more than one article of this Constitution at the same session, nor to the same article oftener than once in four years."

come a part of the Illinois Constitution "if a majority of the electors voting at said election shall vote for the proposed amendments." This last sentence was stated by the Attorney-General to be a "qualifying proviso" upon the previous provision that amendments are to be submitted "in such manner as may be prescribed by law." But there is no "proviso" in the sense in which that word is used by legislative draftsmen. The sentence in section 2 concerning the number of votes required is just one of the several sentences in this section.

However, suppose that it is admitted that the sentence concerning the necessary votes is a "qualifying proviso" of the preceding sentence concerning the manner of submission. What of it? We are in a blind alley, unless it is further assumed that the word "vote" means that an elector must vote according to one of the methods of voting on constitutional propositions that have been prescribed by law in Illinois since the passage of the Australian Ballot Act in 1891. The Attorney-General was again equal to the occasion, and he made the assumption. In order to support his position he made a tricky misstatement of the historical facts. Here it is: "By means of direct affirmative votes, the people of Illinois have amended the Constitution of 1870 on seven separate and distinct occasions and propositions." Here are the facts. Of the seven amendments which have been adopted, five were adopted before the passage of the 1891 act.[25] All five were adopted during the time that the electors could only use unofficial ballots, prepared in the main by various party organizations. If these organizations favored an amendment and printed only the affirmative of the issue on their ballots the voters using them voted for the amendment, regardless of their knowledge and intention, unless they were careful to scratch the affirmative statement. This is common knowledge and there is no reason to think that George F. Barrett is ignorant of it. Therein lies the deception. There is sufficient evidence of this practice of voting for constitutional propositions by merely using party tickets.[26] This is what the Attorney-General calls indirect voting, the type of voting, says he, that is prohibited by section 2 of Article XIV of the Illinois Constitution. The result of his reasoning would be that the first five amendments to the Illinois Constitution of 1870 are invalid because they were adopted by an unconstitutional method of voting.

An additional deception is occasioned by treating the adoption of the last two of the seven Illinois amendments as presenting the same legal problem as the adoption of the first five. There can be no dispute that the

[25] Laughlin, op. cit. supra, note 11, at 150.

[26] Sears, op. cit. supra, note 11; Bogart and Mathews, op. cit. supra, note 11.

last two were adopted in 1904 and 1908 under the "little" or separate ballot method of voting.[27] There, indeed, the voter was in effect a negative voter unless he took his little ballot and made a cross [x] in the proper place on this ballot. Under this method there could be no indirect affirmative votes, but there were many automatic negative votes, including all voters who could not be bothered with a mere constitutional amendment and also those who overlooked voting upon the little ballot. But this sort of indirect voting is constitutional even if it is a public curse.

After making his inaccurate and deceptive historical statement the Attorney-General stated that the question of the constitutionality of the party-circle bills "resolves itself into the question of whether or not the framers of our Constitution could have contemplated the substitution of the indirection proposed in Senate Bill 516 for the time honored and proven custom of direct expression of the will of the voter." The answer given by the Attorney-General follows:

> The foregoing historical resume demonstrates that at the time of the adoption of the Constitution of 1870 "party circle" voting was unknown in Illinois. It is obvious that the framers of the Constitution of 1870 could not have contemplated that the language used in Section 2 of Article XIV would permit the casting of votes on constitutional amendments by means of the "party circle" device. At the time Section 2 of Article XIV was adopted, the only known method of voting upon a proposition was that by which the voter directly signified his intention upon the precise question through an affirmative or negative vote upon that question.
>
> It appears clear to me that it was the intention of the framers of the Constitution of 1870 that an elector, in voting for or against a constitutional amendment, would be required to signify his intention by directly marking his ballot either for or against the proposition.

It is submitted that the first two sentences in this answer are deceptive. Who has said that the party-circle method of voting existed in Illinois in 1870? What has been stated is that at the time the present Illinois Constitution was adopted the method of voting was by unofficial ballots; that most ballots were prepared by party organizations; that party organizations could and did favor constitutional propositions and could and did print only the affirmative of the propositions on their ballots, when they so desired; that this was an effective method of adopting constitutional propositions by use of unofficial party ballots; that the party-circle bills are consistent with this historical tradition; and that if the fathers of the constitution knew, used, and approved of the party-ticket method of voting on constitutional propositions there is no good constitutional reason why present-day electors cannot use the party-circle method when this

[27] Laughlin, op. cit, supra, note 11, at 150.

method is less drastic and better regulated than the party-ticket method was in 1870. Nebraska and Ohio used it to get out of a constitutional bog. Why can't Illinois do the same?

The third sentence in the Attorney-General's answer is utterly false. Nothing is cited in its support and it is contrary to the common information of those who know the history of voting in Illinois. The fourth and last sentence is based on the third.

The Attorney-General failed to mention another item concerning voting in Illinois in 1870. The ballot that was used in voting upon the Illinois Constitution of 1870 is set forth in section 10 of the schedule of that document. Here it is:

Section 10. At the said election the ballots shall be in the following form:

NEW CONSTITUTION TICKET

For all the propositions on this ticket which are not cancelled with ink or pencil; and against all propositions which are so cancelled.

For the New Constitution.

For the sections relating to railroads in the article entitled "Corporations."

For the article entitled "Counties."

For the article entitled "Warehouses."

For a three-fifths vote to remove County Seats.

For the section relating to the Illinois Central Railroad.

For the section relating to Minority Representation.

For the section relating to Municipal Subscriptions to Railroads or Private Corporations.

For the section relating to the Canal.

Each of said tickets shall be counted as a vote cast for each proposition thereon not cancelled with ink or pencil, and against each proposition so cancelled, and returns thereof shall be made accordingly by the judges of election.

Observe the obvious fact that this ballot was designed to make it easy to vote "For the New Constitution" and the eight separately submitted propositions and not so easy to vote against them. Observe also that if a voter came to the polls in July, 1870, with the intention of voting "For the New Constitution" and accordingly proceeded to drop the prescribed ballot in the ballot box without making any marks on his ballot he would have been counted as voting for the eight additional propositions even though he had never read or heard about them and even though he had no intention concerning them. Even if he had come to the polls with the intention of voting against the new constitution or against one or more of the eight additional propositions he would have voted for these propositions if he had misunderstood the meaning of the ballot and dropped it in the ballot box without change. Even if he had correctly understood his

ballt but had failed through oversight or other error to cancel the propositions that he did not favor, still he would have voted for them. And yet our Attorney-General has the effrontery to assert: "At the time Section 2 of Article XIV was adopted, the only known method of voting upon a proposition was that by which the voter directly signified his intention upon the precise question through an affirmative or negative vote upon that question." If George Barrett is not careful, he will be declaring sections 10 to 12 inclusive of the schedule to be invalid because they conflict with Article XIV and thus that Illinois is controlled by its 1848 Constitution because the 1870 Constitution is invalid since it was adopted through an unconstitutional method of voting.

However, there is an Alabama decision which sustains the method of voting that was used to adopt the Illinois Constitution of 1870.[28] At that time the Alabama constitution provided for the submission of constitutional amendments "at the next general election which shall be held for representatives . . . . and, if it shall thereupon appear that a majority of all the qualified electors of the state, who voted at said election, voted in favor of the proposed amendments, said amendments shall be valid."[29] The similarity of these provisions to provisions in the Illinois Constitution is obvious. The Alabama General Assembly of 1896–97 submitted to the voters a taxation amendment applicable to the city of Birmingham alone.[30] The act submitting the amendment provided that it should be submitted at the *general* election to be held in August, 1898. It was also provided that the official ballot to be used at this election should have printed upon it these words: "For Birmingham Amendment." No other words concerning this proposition were to appear on the ballot. The act of submission also provided that the specified words were to be printed "after the names of candidates for state offices and before the names of candidates for county offices." Thus it would appear that the amendment proposition consisting of three words was printed in the middle of the ballot. That this was an obscure if not a deceptive place to print the proposition can hardly be doubted.[31]

The Alabama act of submission prescribed the manner of voting on the Birmingham amendment:

> Any elector desiring to vote for said amendment shall leave said words intact upon his ballot, and any elector desiring to vote against said amendment shall evidence his

[28] May & Thomas Hardware Co. v. Mayor and Aldermen of Birmingham, 123 Ala. 306, 26 So. 537 (1898).

[29] Ala. Const. (1875) art. 17, § 1. [30] Ala. Acts (1896–97) p. 1202.

[31] Compare the voting upon the Illinois amendments in 1892, 1894, and 1896, when they were printed beneath the names of the candidates. Laughlin, op. cit. supra, note 11, at 151.

intention to so vote by erasing or striking out said words with pen or pencil. The leaving of said words upon the ballot shall be taken as a favorable vote, and the erasure or striking out of said words as aforesaid shall be taken as an adverse vote, upon said amendment.

The Birmingham amendment was adopted, and it would appear that it would have taken something in the nature of a political revolution to have prevented its adoption, in view of the drastic method of voting that was prescribed. But this is the method of voting that was provided for the adoption of the Illinois Constitution of 1870. The only material difference is that the Illinois election was a special one, even though some judges were elected at the same time,[32] while the Alabama election was a general election. An attack upon the Birmingham amendment was supported by an able argument.[33] It was asserted by counsel that the amendment was invalid because the prescribed method of voting upon it violated two sections of the Alabama constitution. The main argument was that that part of the Alabama constitution quoted, supra, required positive, affirmative action by the electors to manifest an intention to vote in favor of the amendment, while the statute, on the contrary, required no affirmative action to manifest an intention to vote in favor of the amendment but positive, affirmative action to manifest an intention to vote against the amendment. As a result, it was argued, the Birmingham amendment was declared to have been adopted even though it was impossible to know whether a majority of the electors who voted at the election, had the intention to vote for it, or whether they even knew of its existence. Despite this argument the Alabama Supreme Court in a unanimous decision held that the Birmingham amendment had been validly adopted. The court asserted that "every voter is presumed to know what is on any ballot he deposits as an expression of his will." Armed with this presumption, which the court appears to have thought of as conclusive, it was not difficult for the court to conclude that the Alabama voters who failed to erase or strike out "For Birmingham Amendment" in legal contemplation affirmatively expressed their favor for the amendment.

The second objection to the validity of the Birmingham amendment was that the statute violated section 1 of Article VIII of the Alabama constitution which guaranteed to every citizen, who possessed the specified qualifications of a voter, the right to vote at every election. More specifically, the argument was that: "The statute takes away from the elector

[32] Ill. Const., schedule § 7.

[33] May & Thomas Hardware Co. v. Mayor and Aldermen of Birmingham, 123 Ala. 306, 310 (1898).

his right, recognized by the Constitution to refrain from voting on the amendment and at the same time to vote for the State and county offices to be filled at the election." The court's answer to this argument follows:[34]

> This position takes no account of the consideration that under any possible form of submitting a proposed amendment to the people every elector who votes for a State or county office at the election must through the operation of the Constitution itself in effect vote for or against the amendment. Article XVII, section 1 provides, as we have seen, that an amendment must receive "a majority of all the qualified electors of the State who vote at" the general election to which it is submitted, a majority, not of those who vote on the amendment, but of those who deposit ballots for any purpose. Hence it is that if an elector votes for a State or county office, he necessarily votes on the amendment, for though his ballot contain no reference to the amendment he is counted against it. So that by the terms of the Constitution itself he is deprived of the right to refrain from voting on an amendment if he votes for any State or county office; and the statute cannot be violative of the Constitution for having this same operation and effect. The most that can be said of the statute in this connection is that under it it is easier for the elector to vote for the amendment than against it, in that to vote against it he is put to the physical exertion of drawing a pen or pencil through the words "For Birmingham amendment," and he may vote for it without doing this; and of this it is sufficient to say that such regulations have been several times, and we think correctly held valid.

A New Jersey case[35] is also of interest. In the first place it is stated that New Jersey four times in its history has made use of the Alabama-Illinois type of ballot on constitutional propositions. In the second place the New Jersey Supreme Court unanimously rejected an argument that such a ballot was unconstitutional because it did not give the voter an opportunity to vote on one of three constitutional amendments and to refuse to vote on the other two or on one of them. As in Illinois, if a New Jersey voter voted at all in the special election he could not avoid voting for or against all three amendments. Contrary to Attorney-General Barrett's dictum, it was not necessary that the "voter directly signif[y] his intention upon the precise question through an affirmative or negative vote upon that question." If the New Jersey voter voted directly upon the first amendment and made no mark to signify his intention as to the other two, nevertheless he would have cast affirmative votes for the latter two propositions.

In the New Jersey Court of Errors and Appeals, however, the decision on this latter point is somewhat confused and divided. The judgment of the Supreme Court was affirmed unanimously, but there was some differ-

[34] Ibid., at 324–25.

[35] Bott v. Wurtz, Secretary of State, 63 N.J.L. 289, 43 Atl. 744, 881 (1899), affirming 61 N.J.L. 163, 38 Atl. 1099 (1897) and 62 N.J.L. 107, 40 Atl. 740 (1898).

ence of opinion and the exact division of the court is not made clear.[36] Here is the significant language of the latter court:

> The other objection urged by the prosecutors is that the act providing for the submission of the amendments to the people prescribed such a method of voting—that while every voter was at liberty to vote for any amendment and against the others, or *vice versa*, no elector could vote on any amendment unless he voted on all. This, it is contended, was not submitting the amendments "in such manner and form that the people might vote for or against each amendment separately and distinctly."
>
> Assuming the effect of the statute to be as alleged, it is not clear that it would antagonize the constitution. There is, indeed, a sense in which, under such a law, the people could not vote for or against each amendment separately and distinctly—that is, they would be required to determine how they would vote on any amendment in conjunction with a determination as to how they would vote on each of the others. But in another and an important sense they could vote for or against each separately and distinctly—that is, a determination to vote for or against any one left them entirely free to determine how they would vote on each of the others.
>
> In which of these senses the constitution should be taken is doubtful, and the members of the court are not as one about it; and, under the established rule that courts will not condemn a statute as unconstitutional unless its repugnancy to the constitution be clear, we would hesitate to adjudge this enactment invalid.
>
> But there is another reason to withhold us from such a judgment. Under the statute the election proceeded throughout the state without objection on the part of any person, and, so far as appears, every qualified voter who desired to exercise his franchise has done so in a mode satisfactory to himself, without seeking to vote on some of the amendments while refraining from voting on the rest. So that no right has been denied; no will competent to influence the election has been thwarted, and the discrepancy between the statute and the constitution, if there be any, has proved to be of no practical moment. Under these circumstances we think the same public policy which permitted the prosecutors to present the supposed public grievances now requires us to declare that this is not such a grievance, and the theoretical objection has been waived.[37]

CONCLUSIONS

Even though Attorney-General Barrett's opinion is based upon a false premise of fact and is contrary to all the known law there is on the subject, there is nothing that will prevent the Illinois Supreme Court from agreeing with him if the question ever comes before that court. There is nothing in the law that is less predictable than constitutional law. Notions about governmental policy, party bias, political ambition, various sorts of selfishness—all of these are potent in the writing of opinions on constitutional law.

One cannot forget George Barrett's obvious political ambitions and his harmonious relation with the Tribune Tower, the most powerful, persist-

[36] See the discussion of these cases in Dodd, The Revision and Amendment of State Constitutions 185–209 (1910).

[37] Bott v. Wurtz, Secretary of State, 63 N.J.L. 289, 301–302, 43 Atl. 744, 748–49 (1899).

ent, demagogic, and unyielding foe of constitutional reform in Illinois. This is sufficient to explain why the Attorney-General devoted a paragraph in his opinion to a "stump" speech denouncing the party-circle bills as a "vicious, craftily conceived scheme" which "strike(s) a foul blow at the freedom and integrity of the ballot," et cetera. Then he elevated himself to glory by pretending to protect an honest ballot against machine politics. Quite a blast against a Republican Senate which passed the bills 40 to 1, and a Republican House which passed them 127 to 3 over the intense opposition of Governor Green, who first approved the bills and requested their introduction in the Senate, and then attempted to defeat them in the House after the *Chicago Tribune* condemned them in an editorial. Also it was quite a blast against many organizations which supported the party-circle bills, such as the Illinois Agricultural Association, Illinois Educational Association, Illinois School Boards Association, City Club of Chicago, and the Chicago Bar Association. As against the endorsement of such associations George Barrett's bombast will be passed over by most persons as another ridiculous episode in the long struggle against selfish reactionaries to secure constitutional reform in Illinois.

RUDOLF VON JHERING: OR LAW AS A MEANS TO AN END

WILLIAM SEAGLE*

THE pioneer of the basic modern trends in jurisprudence was a German, Rudolf von Jhering. He might appropriately be called the Mark Twain of German jurisprudence. Gifted with a rare sardonic humor, he led the revolt against philosophical abstraction and conceptualism in German jurisprudence and the glorification of logic as a juristic method, which enabled the jurists to disguise the law as a system of legal mathematics. It so happened that this attack upon logical method in the law hit the basic evil of all nineteenth-century jurisprudence. The controversy raged about logic, but the real issue was a new social gospel whose acceptance was being prevented by false logic. Socialism was in the air but the jurists remained oblivious even of the need for social legislation which would bring about a socialization of the civil law. They simply persisted in applying logically the basic postulates of the individualist philosophy which had become established with the rise of capitalism.

Jhering has been called the German Bentham, but the comparison is not apt for no other reason than that Jhering's creed was a social utilitarianism. He did not share Bentham's passion for codification, taking little or no interest in the drafting of the German Civil Code, which took place during his lifetime. Jhering was interested in function rather than formal definition. It seems strange that a social struggle should have been carried on in terms of a controversy over the place of logic in juristic method, but controversy in jurisprudence is always oblique. The first revival of commerce raised the issue of the reception of the Roman law because that system of law was far more advanced than Germanic law; the rise of capitalism was tied up with the movement for natural law, which afforded a means of rationalizing the Roman law; and it was to be expected that the demand for far-reaching social changes should lead to bitter discontent with a juristic method that was employed to give the basic institutions of the existing order an appearance of eternal and unalterable truth. Logic had always been the chief tool of jurisprudence from Gaius to Blackstone. It served well enough in periods of quietism, when there was no need to question the premises which underlay the logical deductions of the jurists. Logic, however, was bound to become the chief focus of attack in an age of rapid transition and change.

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The nineteenth century, which was a period of great scientific inventiveness, was rather paradoxically a period of comparative stagnation in the field of the civil law. The jurists were content with the rationalization of the basic legal principles of property and contract which had been accomplished in the name of "equity" in the countries of the common law, and in the name of "natural law" in the countries of the civil law. Such legal inventiveness as was manifested in the nineteenth century was in procedural law, and in the amelioration of the criminal law. Bentham, although a great procedural inventor, believed in the fundamental verities of Adam Smith, and therefore had no violent quarrel with the substantive principles of the common law. The movement for codification, which he stimulated, produced its greatest accomplishment in France when Napoleon caused to be drafted one civil code for all the provinces of France; but this *Code Napoléon* merely restated the precepts of natural law and the principles of customary law as they had been worked out by the great French legists of the sixteenth and seventeenth centuries. In the United States there had been produced the great original procedural invention, the device of judicial review, which was revolutionary in form, and had as great an effect upon the judicial systems of the country as the cotton gin and the automobile, but this effect was reactionary, and actually retarded the development of the substantive law. With a judicial oligarchy in control of legislation, the basic dogmas of property and contract remained unaltered far longer than elsewhere, and the system of laissez faire became the touchstone of the Constitution.

It is a rather singular irony that the juridical revolution should have occurred in Germany, which began the nineteenth century with the most backward legal system among the countries of Western Europe. The Industrial Revolution did not come to Germany until after the middle of the century but the juridical revolution occurred earlier there than in England, the United States, or France. History later repeated itself when Socialism was first realized in Russia, the land of the czars. The causes of the juridical revolution were the same as those of the industrial revolution in Germany, namely, political unification, and the application of the latest science. The *Code Napoléon*, which has been happily called the *code bourgeois*—so well is it adapted to the needs of the middle-class estate—was proclaimed in 1804, but the German Civil Code did not go into effect until January 1, 1900. Germany had the advantage of the latest juridical machinery even as it had the advantage of the latest industrial machinery. All the juristic discoveries of the nineteenth century seem to have been "made in Germany." But it is no exaggeration to say that through most

of the nineteenth century Germany could boast the greatest jurists and the worst legal system of any country in Europe. Such men as Friedrich Karl von Savigny and Theodor Mommsen, the great Romanists, and Bernhard Windscheid, the master of the pandects, as well as Otto von Gierke, Karl Friedrich Eichhorn, Georg Ludwig von Maurer, and Rudolf Sohm, the leading Germanists, who indefatigably investigated the origins of Germanic law, all achieved international reputations. But these jurists were interested only in legal history or the philosophy of law. They paid little or no attention to the needs of practical jurisprudence, which they left entirely in the not too capable hands of the practitioners. Since political unification is the first prerequisite of any effectively functioning legal system, the task of the jurists would perhaps have been hopeless. They sought fame therefore in purely scientific labors.

The scientific cultivation of jurisprudence, in the historical as well as the philosophical fields, is a characteristic of the maturity of law. The arts of jurisprudence are not cultivated by people in primitive or archaic civilizations; there are no jurists; and the needs of practice are all-absorbing and sufficient. The first phase of juridical philosophy had been represented by natural law speculations in ancient Greece and Rome as well as in the Europe of the sixteenth and seventeenth centuries. But it was in the nineteenth century that philosophies of law were elaborated in all their infinite variety. Juristic philosophy even became an independent branch of philosophy. The connection between the maturity of law and the development of the philosophy of law is manifest particularly in England precisely because England has never been the home of abstract philosophy. Yet in the first half of the nineteenth century the English produced a juristic philosopher in the person of John Austin, the founder of the so-called analytical school of jurisprudence. Austin, a middle-class liberal, who resigned an army commission to study legal philosophy in Germany, represented a reaction against natural law ideas. He attempted to separate the law from moral philosophy, and to found a positive science of law, based upon the precepts of the existing system of English law. He regarded law as the command of the sovereign; in broader terms, law consisted of those rules that had the forceful backing of politically organized society. In Austin is manifest the beatitude of the common law; analytical jurisprudence is simply the rationalization of the established order, regarded as eminently satisfactory. The flirtation with German juristic philosophy had apparently done Austin no harm. He merely restated in more abstract philosophical terms the theme of Blackstone.

But during the same period in Germany there reigned triumphant the

"historical" school of jurisprudence founded by that German aristocrat, Friedrich Carl von Savigny. The very fact that he had deigned to enter upon an academic career as a teacher of Roman law was regarded as an act of unparalleled grace. Savigny conducted monumental researches into the history of Roman law, but even in this activity he had an unfortunate effect upon practice, for he tended to elevate the ancient Roman law as the "pure" law as against the law of the pandects, the *usus modernus pandectarum*, the modified Roman law which had actually obtained in the German states since the general reception of Roman law in the fifteenth century. But far more mischievous in its effect was the philosophy of history which was espoused by Savigny, and became the accepted doctrine of the historical school. Representing the political reaction in Germany, which had so firmly entrenched absolutism in all the Germanies that it could not be broken even by the revolution of 1848, Savigny taught that a nation's law, like its language and other cultural attributes, was an unconscious emanation of the *Volksgeist*, the "genius" of its people. Customary law was therefore law par excellence—the chief source of law. For this reason, Savigny opposed codification for Germany, and in a celebrated pamphlet, *Vom Beruf Unserer Zeit für Gesetzgebung und Rechtswissenschaft* (On the Vocation of Our Times for Legislation and Jurisprudence), denounced the creators of the *Code Napoléon* as "miserable dilletanti." He thus opposed not only the revolutionary doctrine of natural law but positive legislation. It might be supposed that he would have been nonplused by the fact that the *Volksgeist* in Germany had manifested itself in the reception of the alien Roman law, but he simply invented the fiction that in mature systems of jurisprudence the learned jurists act as the representatives of the *Volksgeist*. In fact, however, the historical school could not reconcile the contradiction between the reception and the theory that the origin of law was to be found in the folk-spirit. There should be recalled Karl Marx's jibe at Savigny, which was that he became so absorbed in the sources of the law that he became oblivious of the main stream.

The "historical" school was misnamed, for it really was a philosophical school. The reaction to the historical school, which began even during Savigny's ascendancy, did not give a more realistic basis to German jurisprudence. The opposing school, correctly called the "philosophical" school, took its inspiration, of course, from Hegel, who was only another reactionary with a profound belief in absolute monarchy. Hegel regarded the state as the essence of freedom and reason but the state was represented by the monarch. He perceived in law the evolution of the idea of free-

dom, and in the freedom of the will the essence of individual freedom. Apparently he was not bothered very much by the obvious facts that at least the German states were not the embodiments of liberty and that the science of the law had always been overshadowed by restraint. In Germany it was not usually regarded as a legitimate objection to a philosophy that it was nonsense. As Heinrich Heine said, Britain ruled the seas, France the land, while Germany ruled the clouds. The most dire consequence of Hegel's emphasis upon the freedom of the individual will was that it led to a "will jurisprudence." The jurists, instead of considering social and practical requirements, thought in terms of individual intention and the realization of the individual will in the construction of legal transactions, and in terms of legal powers rather than legal duties. In the mature Roman law and common law, the lawyers also made much of "intention," but they never quite carried the business to the same degree of absurdity. The "civil" law, which is often called private law, is always the preserve of the individual, but "will jurisprudence" reflected as never before the freedom of contract which the jurists had made omnipotent.

The other main opponents of Savigny were the "Germanists," whose master was Otto von Gierke. The Germanists really believed in the *Volksgeist*, and were rarely, if ever, outdone by the Romanists in the ardors of historical research, but they were alienated by Savigny's predilection for the pure Roman law and his slighting of the Germanic elements in practice, which really represented whatever adaptations had been made to current needs. The Germanists undoubtedly conducted valuable researches into the origins of German law, but their efforts to re-establish the more Gothic and quainter legal elements of the German past were only another phase of romanticism. The mature Roman law was of course a far better basis for a modern jurisprudence than the medieval *Sachsenspiegel* or the *Schwabenspiegel*, the two great monuments of archaic German law. But the question was not whether either Romanistic or Germanistic elements were to be preferred but whether given legal institutions met contemporary needs. The endless squabbles between the Romanists and the Germanists were an important factor in postponing the adoption of a German Civil Code.

The condition of German jurisprudence had been aggravated not only by its contact with German philosophy since the days of Emmanuel Kant but by the habits and traditions of German university life. The undue emphasis upon academic rank, which could be achieved only by contributions to scholarship, led to an endless production of doctoral dissertations and treatises whose ostensible purpose was the increase of juristic knowl-

edge but whose actual purpose was only academic advancement. The passages in the *corpus iuris* of Justinian had been the subjects of learned commentaries for centuries, and originality could rarely, if ever, be achieved except by absurdity. Moreover, unlike the case in England and America, the bar and the judiciary were rigidly separated corps, and the fructification of scholarship by men with experience in practice rarely occurred. Until about the middle of the nineteenth century the medieval practice of submitting questions of law to a member of the university faculties had not disappeared, but such submissions were usually only another opportunity for the academic airing of a favorite juristic theory. The atmosphere, social and political, of the typical German university town, usually located in a provincial center, was, too, not calculated to stimulate bold and independent thinking.

Rudolf Jhering was not an iconoclast born. Athough he had the right temperament, it did not reveal itself publicly in the first two decades of his career. Born at Aurich in East Frisia on August 22, 1818, he came of a family that boasted a long line of jurists and civil servants. His great-great-grandfather was Herman Conring, one of the few German realists who had pioneered in economics as well as political science and had left his mark in ridiculing the Holy Roman Empire. Jhering had the conventional education of his time. He left the gymnasium at the age of eighteen and studied at Heidelberg, Munich, Göttingen, and Berlin. His intention at first was to enter the civil service, but the government of his native town in its infinite wisdom refused him a post because his brother was already in the civil service. Saved for jurisprudence, he thereupon entered upon the teaching of Roman law. The first five years of his academic career were spent successively at Basel, Rostock, and Kiel, but it was not until he reached Giessen in 1852 that he settled down for more than a decade and a half of teaching and the composition of the work which he then believed would be his magnum opus, the *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (The Spirit of the Roman Law in the Various Stages of Its Development), which appeared in four volumes from 1852 to 1865 and was translated into the principal European languages. His growing fame brought Jhering a call in 1867 to teach at the University of Vienna, where he achieved great success, but he remained there only until 1872. He found the Austrian capital highly stimulating but also very distracting. Having already projected a new magnum opus, he gladly accepted a call to Göttingen. He taught and worked there during the rest of his life.

There was little in the life and labors of Jhering in his early days at

Giessen that betrayed the philosophy of his later years. In a sense an adherent of the historical school, he criticized the theories of Savigny but without striking a true note of revolt. He rejected the narrow nationalism of Savigny, and emphasized at least the universal character of the later Roman law. He declared that the historical school debased legal science to the plane of territorial jurisprudence, and made the scientific boundaries coincide in jurisprudence with the political. He perceived in the reception the working of a process of international legal exchange. "To prevent reception from without and to condemn the organism to development from within outward is to kill it" he said. "That sort of development begins with the corpse." He appreciated the contradiction between the reception of Roman law and the workings of the folk-spirit, and pointed to the "singular irony of scientific fate that a thought that should have brought death to the Roman law was invoked to save its life." Ostensibly a historian of Roman law, he was really bent on a search for its permanent usable elements. He even formulated a slogan to express this objective: "Through the Roman law, but beyond it."

Such, too, was the purpose and philosophy of the *Geist*. It was to be a study, as much anthropological as legal, first, of the specifically national ideas which were revealed in the oldest Roman law, the *ius civile*, which was the exclusive possession of Romans, and then of the career of Roman jurisprudence as a universal system, when it had become the *ius gentium*, the law of Roman and foreigner alike. Although he published no less than four volumes of the *Geist*, Jhering never got beyond the analysis of the general characteristics of the specific Roman system, which was pushed only to the point of completing the discussion of the general conception of a right in Roman law. Jhering in these days spoke of the "higher" or "productive" jurisprudence as the cause to which he had devoted his life. But in attempting to rediscover the "spirit" of the Roman law in the various stages of its development, he was as much a dogmatist as Savigny. He was attempting by a process of mere introspection and psychological interpretation to develop the peculiar nature of Roman legal concepts and ideas. In Roman law he discovered the conceptions of liberty and equality as national concepts, and in the methodology of the Roman jurists he perceived a unique contribution to the science of law. If he had known more English law, he would have discovered the folly of this enterprise much sooner than he did, for the same values were to be discovered in the history of the common law at an analagous level of development. The "spirit" of the common law was in fact the same as the "spirit" of the Roman law. Characteristic ideas and institutions are to be dis-

covered in primitive, archaic, and mature law, but they are determined, not by national elements, but by social and economic needs that are pretty much universal in the same phase of the historical evolution of a legal system.

The letters of Jhering's Giessen period reveal doubts of the value of his own labors, intimations of the wasteland of German jurisprudence, and humorous touches of despair. Writing to Gerber, he once observed: "There prevailed not so long ago in the natural sciences a method of investigation that bore the strongest resemblance to present methods in jurisprudence—the study of nature from the pages of Ulpian and Paulus." Occasionally he expressed a positive distaste for everything that even smacked of jurisprudence. He rejoiced that in Windscheid he had found a friend "who does not regard every word of a Roman jurist as gospel." "My life," he once confided to him, "is a rather unvarying and monotonous idyll that is bound up with the sections of Puchta's compendium on the pandects; the only change is that every day is devoted to different sections." Jhering used Puchta's book as a text, and had even dedicated the first volume of his *Geist* to Savigny's pathetic disciple. A year later, he also confessed that "there lives in my consciousness a demoniac force that cannot be satisfied with the quietude of conventional life, that yearns for adventures and extravagances of all sorts." With humorous despair, he observed that the *Geist* was "a book for educated laymen (for which reason many uneducated jurists do not read it)." Jhering must have felt particularly neglected when he once complained bitterly that the correspondence of scholars was inspired only by books, and that it was necessary to write a whole volume to get a single letter.

Jhering's break with the historical school and his abandonment of conceptual jurisprudence began about 1860, on the eve of the German struggle for national unification. A decade later he was an open and avowed champion of a new juristic method. The forces that produced the new Germany made it possible for him to develop the natural bent of his temperament, but the transition was cautious and slow. The sober professor could not become the satirist overnight. His interest in politics had never been strong. There is no evidence that he had participated in the events of 1848, or that he had been stirred by the revolutionary fervor of this stirring year although he was then a young man of thirty.

The war of 1866 against Austria at first distressed Jhering greatly. The basic tenet of his later philosophy was that law was a method of reconciling conflicting interests, rather than a process of determining abstract rights, and the conflict with Austria was an object lesson in the importance

of interests. He wrote at the time to his friend Windscheid: "What a conflict between the feeling of right and of interests. My feeling of right aligns me on the side of Austria. I condemn the criminal sport of Bismarck that plays with everything that can be called justice and truth. And yet I shudder at the thought that justice may triumph!" But the professor of jurisprudence rapidly overcame his scruples, when right was overcome by might. He became a slavish admirer of Bismarck for the rest of his long life. "I bow," he said, "before the genius of a Bismarck who has delivered a masterstroke of political combination and energy unique in history. . . . . I would not have believed nine weeks ago that I would be writing a dithyramb about Bismarck."

Jhering's attack on the vagaries of conceptual jurisprudence began with a series of six *Confidential Letters*, which were published anonymously from 1860 to 1866 in a German legal periodical. Of all his writings they are the most reminiscent of Mark Twain. Their anonymity doubtless explains the completeness with which Jhering yielded to his penchant for hilarious satire. He did everything possible to make it difficult to detect the secret of their authorship. Thus he even made himself the butt of his own satire. He complained that a series of letters had never before been devoted to jurisprudence. The only subject of belletristic endeavor in jurisprudence had been books devoted to the "spirit" of this or that system of jurisprudence. There had been "spirits" of Roman law and of Prussian law, and he expected the publication of a spirit of Hessian law, and the like. He had dedicated his *Geist* to Puchta, the faithful disciple of Savigny. Puchta now became his *bête noire* even as Blackstone had been Bentham's.

Fifty years before his time, pretended Jhering, "civilistic construction" had been unknown. But now a civilist and construction were as inseparable as a lady and crinoline. The civilistic homunculus, the concept, mating with his like, became productive, and begot children. The jurists analyzed the nature of obligations; and the more complex variety of obligations in the Roman law gave them more headaches than the theologians derived from the concept of the trinity. Between various types of obligations there was supposed to be all the difference between animals on two and four legs although the distinctions were of no practical importance. The jurists debated, for instance, whether an obligation was to be conceived as a right *to* an action, *in* an action, or *over* an action. They dwelt especially upon the mysteries of juristic personality. Succession to property was defined as a right to the personality of the dead—the juristic version of the reincarnation of souls, the juristic proof of the immortality

of the soul. The juristic personality was no more received by the grave than the soul. Again, construe the juristic nature of theatre-going, and you will discover that the ticket entitles you to enter the theatre only as a representative of an abstract juristic personality. By way of reaction to juristic personality one jurist had, however, conceived of freedom as the right of property in the human body. Freedom of speech would thus be a derivative of the individual's right of property in his means of speech—the freedom of the tongue. When you scratched yourself you only exercised a property right.

The second of the confidential letters dealt especially with the concept of *hereditas* or heirship in Roman law which presented great complexities because the Roman heir was regarded as a universal successor who inherited not only the property but the personality of the deceased. Jhering felt that unless he solved this riddle he would be cast into the abyss, like one who could not solve the riddle of the sphynx. Jhering pretended that he awoke in a cold sweat in the middle of the night, feeling that he had grasped the nature of *hereditas*. When the doctors were called in they diagnosed his condition as a case of brain fever, never suspecting that it was actually a case of juristic delirium. When he finally read one history of the Roman law of inheritance, he felt like a man who had thrown away a lottery ticket that had won.

The third and fourth letters were primarily devoted to the divorce between theory and practice which had become a prime characteristic of Jhering's generation. He pictured the theoreticians as the makers of the sword of justice which they had sharpened so fine that it could split hairs, and developed the theme that while a barber did not go to a razor maker as a preliminary to learning the art of barbering, a practicing lawyer was required to undergo a period of training with theoreticians. He gave numerous examples of the differences in approach between theoretical and practical jurisprudence but none perhaps so amusing as the discussion of the case of the peasant who was forcibly evicted by a rascally neighbor after he had taken possession of his absent brother's property. He lost the law suit although he had clearly been in possession, because he could not prove that in holding the property he had had the requisite *animus domini*, i.e., the intention of exercising dominion, as required by Savigny's theory of possession.

The fifth letter was an imaginary address on a juristic museum of objective and subjective law, and the sixth and final letter commented on the frightful flood of juristic literature which was produced by the *privat Dotzenten* who aspired to become professors. It was the rule in Roman law that only those could inherit who had children, i.e., *liberi*. Punning on the

Latin word, Jhering remarked: "The significance possessed in Rome by bodily fruitfulness is possessed among us by spiritual fruitfulness; without *liberi*, no inheritance was the rule there, without *libri* no professorship is the rule here." Jhering suggested the advisability of giving aspirants the *ius scribendi*, which would entitle them to professorships if they published no books.

Jhering's first public attack on German jurisprudence was his little book *Der Kampf um's Recht* (The Struggle for Law, 1872), which had its origin in a lecture he delivered to the bar association in Vienna, but it caused a far greater stir than any of his other works. It was translated into every European language, and even into Japanese. Paradoxical in form and content, almost as continuously epigrammatic as Oscar Wilde, it created furious discussion and controversy. To the more obtuse of Jhering's critics, it seemed only to have been written in praise of litigiousness. The story has even been circulated that *The Struggle for Law* was inspired by Jhering's loss of no less than three suits involving his landlord in Giessen. It has also been surmised that the book's philosophy was a reaction against the famed *Gemütlichkeit* of the Viennese character. But presumably every philosophy has a personal background. Actually the *Kampf* was a bridge between Jhering's two major works and two major periods of activity. It was an attack on the historical school at the same time that it anticipated Jhering's future theory that the law was not a system of abstract rights but a method of reconciling conflicting interests.

The basic idea of the *Kampf* was that the origin of law is to be found in social struggles. The concept of struggle is in law what the concept of labor is in political economy.

> The end of the law is peace [proclaimed Jhering]. The life of the law is a struggle—a struggle of nations, of the state power, of classes, of individuals. . . . . The means to that end is war. . . . . Peace without strife, and enjoyment without work, belong to the days of Paradise. . . . . For the law is Saturn devouring his own children. The law can renew its youth only by breaking with its own past. . . . . The birth of law like that of men has been uniformly attended by the violent throes of childbirth. . . . . A principle of law won without toil is on the level with the children brought by the stork: what the stork has brought the fox or the vulture can take away again.

But if the life of the law is a struggle, it can endure only if the individual is ever ready and vigilant to defend his rights. He must not be materialistically minded, and think only of the profit and loss in litigation. He must think of the sacred rights of personality, and the welfare of society, for upon this will depend the extent to which legal rights are asserted and observed. Most persuasively Jhering urges every individual to the struggle for law.

> Property is but the periphery of my person extended to things . . . . the battle for one's legal rights is the poetry of character. . . . . If I were called upon to pass judgment upon the practical importance of the two principles: "Do no injustice," and: "Suffer no injustice," I would say that the first rule was: "Suffer no injustice," and the second: "Do none!" . . . . Every man is a born battler for the law in the interest of society. . . . . The battler for constitutional law and the law of nations is none other than the battler for private law. . . . . What is sowed in private law is reaped in public law and the law of nations. . . . . Every despotism has begun with attacks on private law, with the violation of the legal rights of the individual. . . . .

Jhering undoubtedly said much also that merely glorified the litigious individual. He praised the traveling Englishman who would not allow himself to be cheated even of a shilling. "I recollect," he also wrote, "having heard of a judge who, when the amount of the object in litigation was small, in order to be relieved of the burden of the trial, offered to pay the plaintiff out of his own pocket, and who was greatly offended when the offer was refused." But nothing in the *Kampf* aroused so much controversy as Jhering's eloquent defense of Shylock, and his denunciation of those machinations by which he was cheated of his pound of flesh. Shylock was right to say: "I crave the law." It was absurd to cheat him by sophistry of a legal right which was admitted to be his.

The concept of the law as a social struggle was, of course, the direct antithesis of the philosophy of the historical school, and the *Kampf* contains in passing some of Jhering's best barbs against its exponents, as for instance when he observed that in the theory of the historical school the Roman law of debtor slavery grew in the same way as "the grammatical rule that *cum* governs the ablative." However, the polemic against the historical school was incidental; Jhering was rather outlining a positive new philosophy, which would supersede it. Those who saw in the *Kampf* only the glorification of litigiousness were significantly the reactionaries who wondered where all this talk about the rights of the personality would lead. Doubtless to law reform: In czarist Russia, the *Kampf* became indeed a sort of revolutionary handbook. But here and there even the bourgeois thrilled to Jhering's eloquent insistence upon the rights of personality. In fact Jhering did not summon every individual to perpetual litigiousness. He contemplated only that every individual would defend the basic moral conditions of his existence. Thus the officer would defend his honor, the peasant his land, the merchant his credit. In a sense Jhering merely reaffirmed Aaron Burr's famous dictum that law is that which is boldly asserted and plausibly maintained.

The essence of Jhering's final philosophy of law was expressed in *Der Zweck im Recht*, the first volume of which appeared in 1872. The first vol-

ume of this magnum opus of his later years has been translated into English under the title *Law as a Means to an End*. Jurisprudence itself has been only a succession of slogans, and the English title is perhaps a better slogan than the German original. The impulse of the book derived, of course, from the unhealthy state of German jurisprudence, but Jhering was the typical German professor at least to the extent of evolving his extremely practical theory from a purely philosophical conception. He prided himself indeed on being something of a philosopher, although the professional German philosophers have never conceded the validity of his claim.

Jhering's fundamental philosophy is based upon a theory of psychological causation. The physical world was entirely subject to the laws of cause and effect. In the animal world some actions were wholly automatic and involuntary. Homo sapiens in the discharge of his natural functions was subject to the same law as the animal kingdom but the operations of his mind were not involuntary. On the contrary, they were always guided by some concept of purpose. But, said Jhering, "You might as well hope to move a loaded wagon from its place by means of a lecture on the theory of motion as the human will by means of the categorical imperative. . . . The real force which moves the human will is interest." Thus "interest is an indispensable condition of every action," and "purpose is the creator of the entire law. Since human life and social life are synonymous, the entire scheme of the law may be stated in the proposition: 'I exist for myself, the world exists for me, I exist for the world.' "

The law was not a system for delimiting abstract rights but a system of reconciling conflicting interests. Legal concepts had within themselves no productive power, and they were not in themselves eternal. The jurists must cease acting as if the legislators themselves must respect the juristic concept. One legal principle could not be derived from another by a process of logical deduction. The idea of analysis and combination of legal principles, which jurisprudence had borrowed from mathematics, was a false dogma. The world of legal concepts was not self-contained. Society would not wait for the jurist to "construe" its needs. Facts must not be stretched upon the Procrustian bed of legal concepts. Legal principles could not be extended merely by a process of analogy; they did not contain in themselves the correct solutions for every legal controversy. A case, for instance, could not be decided merely by determining whether a particular transaction fell into the category of "contracts," "sale," or "lease." The judge was not an automaton who pronounced his judgments merely on the basis of pre-established legal principles. Justice itself was only

a changing idea of proportionality. Constructive jurisprudence was barren and bankrupt, and must be replaced by a system of social mechanics.

Man was an egoist but he was capable of altruism. The levers which society employed to overcome his egoism were reward and coercion. "Law," Jhering said, "is not the highest thing in the world, not an end in itself, but it is merely a means to an end, the final end being the existence of society." He saw "law evolving as the politics of force," "as the intelligent policy of power," "as the union of the intelligent and farsighted against the nearsighted." He realized that "public spirit within the system of egoism is a phenomenon just as strange as a flower on a bare rock," and it is for this reason doubtless that he placed the chief emphasis on coercion. But coercion was redeemed by the fact that "the right to coerce forms the absolute monopoly of the state." "Individual, association, state—such is," said Jhering, "the historical stepladder of social purposes."

The *Zweck* is devoted mostly to a discussion of the chief ends that should be served by law. Jhering saw the world of plenty that was already coming into existence. "A poor man today," he said, "is served for a few pennies by more people in all parts of the earth than Croesus could conjure if he had wished to empty all his treasure chambers." But, while he had a good deal of sympathy with socialism, the philosophy he preached was not outright socialism but rather "the socialization of law," a slogan that has been as powerful in modern jurisprudence as the slogan "law as a means to an end" itself. In Germany, social reforms were introduced by Emperor Wilhelm himself upon the advice of his idol Bismarck (perhaps the first National Socialist), and Jhering saw nothing incongruous even between socialism and monarchy. He described the Manchester economic and political philosophy of preventing the interference of one individual with the freedom of another as a method of preventing the wild beasts in the zoo from tearing each other to pieces. He was eloquent in his denunciation of the abuses of capitalism. "Unlimited freedom of trade," he said, "is a license for extortion, a letter of marque for robbers and pirates with the right of holding up all who fall into their hands—woe to the victim! That the wolves cry for freedom is easy to understand. But when the sheep, as has often been the case in this question, join in the cry, they only show thereby that they are sheep." He also declared: "In my eyes there is no error more serious than the idea that a contract as such, as long as its content is not illegal or immoral, has a just claim upon the protection of the law." The evils of modern corporate enterprise were already apparent enough to arouse him to vehement protest. "Under the eyes of our law-

givers," he observed, "the joint stock companies have been transformed into organized agencies of robbery and deceit, whose secret history covers more baseness, dishonor, villainy than many a penitentiary, except that the thieves, robbers, and swindlers, instead of lying in irons, are bedded in gold." Nobody realized better than he the emptiness of legal equality. "Equality," he said, "may be as much as anything else equality of misery." He was also unique among German jurists of the time in his concern over civil liberties and constitutional limitations. As a German, the American ideas of judicial review were alien to him but he did preach a doctrine of "auto-limitation" in the relation of the state to the individual, which was later to be erected into a system by another German jurist, Georg Jellinek.

It is easy to probe the difficulties and limitations of Jhering's thought as a systematic philosopher, and there have been many critics of his ideas of purpose and interest. Jhering was a satirist, and, like all satirists, he took advantage of the traditional latitude and exaggerated the undoubted evils of his time. Logic does have a genuine place in juristic method, as in all the social sciences. The passion for "constructive jurisprudence" that was so characteristic of the German jurists had its origin in the need to systematise and unify the variations in the law of the *Pandects*, and so to create a system of German common law which should be a fitting substitute for a German civil code, which was then still lacking. There are also undoubtedly some rules of law that are purely formal in character, and must necessarily be arbitrary. Such rules may have a social purpose but the same social purpose could as readily be served by some other legal rule.

Indeed the fundamental difficulty of Jhering's philosophy is precisely that it provides no objective criteria for determining the purpose which the law is to serve, and for selecting the interests which the law is to protect. Law was undoubtedly a means to an end but what end? Who was to determine the end? The individual, the society, the personal ruler, the abstract state? When one end is assumed, is only a particular means to be allowed? In relation to the individual is egoism rather than altruism to be encouraged? When is the lever of reward superior to the lever of coercion? Jhering was always talking of the demands and needs of "life," and he tended to comprise in the law the whole of life. But the purposes of life are many and manifold, and Jhering provided no infallible guide through the maze of purposes. His thought was itself a struggle of contradictions between egoism and altruism, idealism and realism, Benthamism and social utilitarianism, individualism and socialism, nationalism and internationalism, lust for power and respect for law.

But the very fact that unlike other German philosophers Jhering never really built a system was the secret of his enormous influence. The relativism of his thought proved popular because it could serve to rally all the forces which were attacking the undoubted abuses of his age. Doubtless there had always been jurists who suspected that the law served some social purpose. The merit of Jhering was to put this thought in the very centre of jurisprudence and to employ all the resources of his wit and satire to keep it there. His ridicule of eternal legal concepts was no mere side play of a juristic philosopher. It reflected the socialist attack on property and the complications of modern industry which were putting the classic concepts of property to the test. Friedrich Nietzsche, a kindred spirit, read the *Zweck*, although his eyesight was failing, because he thought that Jhering was proclaiming new values. Jhering resembles Nietzsche also in the variety of his disciples who exceeded the fervor of the master. He has been responsible in one way or another for all the modern schools of jurisprudence not only in Europe but in America.

In Germany Jhering was responsible for the "free law" law school, whose exponents based themselves upon his attack on the formal and objective elements in the judicial process. If law was not created by a process of logical deduction, rules of law were themselves illusory and represented only a logical disguise of intuitive judgments. Why not, therefore, free the judge entirely from the trammels of the supposed rules of law, and allow him to base his judgments freely on his social intuitions? Ernst Fuchs, who may perhaps be regarded as the leader of the free law school, preached a sort of juridical *Kulturkampf* against "pandectology and cryptosociology," both of which terms he invented. Another disciple, Eugen Erlich, explored even more thoroughly than Jhering the place of logic in juristic method, and issued a call for the creation of a "living law." While Jhering was not the primary influence in the field of modern criminology, his ideas were in harmony with its emphasis upon the criminal rather than his crime, and he undoubtedly helped to create the criminological school of Franz Liszt, the representative of positivism in Germany. Along more conventional lines, Jhering's insistence upon the jurisprudence of interests led to greater attention in Germany to business usages, and to the case method of studying law. At the other extreme, he inspired even the Marxists, who made use of the jurisprudence of interests to contend that the function of law was to give effect to class interests. Jhering was like the sorcerer's apprentice who could not stop the magical process which he had initiated.

In France Jhering's influence was impeded by his idolatry of Bismarck

and his justification of the Franco-Prussian War. French jurists were accustomed to speak of German jurists in general and such jurists as Jhering in particular as "*jurisconsultes brutaux*," and to characterize their works as "*brigandages juridiques*." Yet, despite the fact that he was regarded as an apostle of imperialism and power politics, it is easy to perceive the relation of his thought to such a modern French juristic theory as the theory of the "institution" and "concrete order."

It was certainly no accident that Jhering also became a demigod in America on the other side of the Atlantic. There were strong similarities between legal conditions in Germany and the United States. Germany was revolting against the reception of the Roman law and was struggling to adapt it to the needs of a unified state. America, a federal union, was still in the toils of adapting the English common law to the needs of a democratic and increasingly industrialized nation. Germany had to overcome the extravagances of the historical school while America was still the home of the seventeenth and eighteenth century philosophy of natural rights thinly disguised as constitutionalism. There was thus a certain affinity between Friedrich Karl von Savigny and John Marshall and his judicial successors. America, too, was suffering from the tyranny of legal concepts. Constitutional problems involved vast social, political, and economic interests, but the method of reconciling them was to ignore realities, and to solve them in terms of abstract constitutional concepts such as "freedom of contract," "due process," and "interstate commerce" by a process of pseudological analysis. The revolt which was ultimately led by Justices Holmes and Brandeis owed much to the thought of Jhering. In fact the title of Brandeis' book, "Other People's Money," is a phrase which is to be found in *Law as a Means to an End*. Jhering's observations on freedom of contract and the evils of corporations had, too, an obvious bearing on the American constitutional scene.

The gradual emergence of a new constitutionalism was accompanied by the rise of an American school of sociological jurisprudence, of which Jhering may justly claim to be at least the godfather. The first leader of this sociological school, Dean Roscoe Pound of Harvard, spoke of the "law in action" in contrast to the "law in the books," of the law as a method of "social engineering," and of "the effective limits of legal action." He even wrote a book called "The Spirit of the Common Law" in an effort to discover the essential characteristics of the Anglo-American legal tradition. But, unlike Jhering, Dean Pound never freed himself of his preoccupation with legal concepts and techniques; and as his ideas grew increasingly conservative, a critical spirit swept American legal philos-

ophy, and a "realist" school was born. The "realists" do not always agree among themselves but generally speaking they are much closer to Jhering's later thought than Dean Pound. They have the same skeptical attitude toward the efficacy of legal rules and concepts and place the same emphasis upon purposeful legal activity of the judge and the jurist, and upon the administrative element in the American legal system. The whole modern American growth of administrative agencies, such as boards and commissions, from the Interstate Commerce Commission to the National Labor Relations Board, owes much to Jhering's gospel of purpose and interest. The influence of American constitutionalism had retarded the growth of administrative agencies, but they are a commonplace now in a highly industrialized America. Unlike the traditional courts, they exist to accomplish some particular social purpose, or correct some particular social abuse, but they are designed to fulfill their tasks without observing all the techniques and procedures of the conventional legal system. It is significant that one of the most brilliant of the realists, Jerome Frank, was formerly chairman of the Securities and Exchange Commission. Other leading realists are teachers of law such as Karl Llewellyn, Max Radin, and Hessel E. Yntema.

Jhering himself was not unaware of his influence in foreign lands. In a letter written on November 11, 1881, to his young friend Oskar Bülow, he noted the acclaim his *Zweck* had received in North America, and on another occasion in mentioning an honorary membership conferred upon him by the faculty of the University of Kazan, he remarked that his fame had apparently penetrated even to the Arctic. But he undoubtedly regarded as the greatest honor of his old age a visit which he was invited to pay to his idol Bismarck. He considered that he had already been privileged enough when Bismarck graciously accepted an honorary degree from the university faculty. But his joy knew no bounds when during his visit to Bismarck the latter addressed him as "colleague." The satirist was certainly dormant when in writing to Bismarck on September 15, 1888, he even attributed his legal ideas to him, and remarked that he had only carried out in jurisprudence the ideas expressed by his idol in politics.

On the second day of Christmas Jhering always wrote a letter of condolence to the wife of his friend Julius Glaser. In the letter of 1891 he wondered whether he would be alive to write the following year. But he had been ailing for some years, and, while he was in the midst of planning a trip to the Berchtesgaden region, he died suddenly on September 17, 1892, in his seventy-fourth year. Shortly before his death he had celebrated his fiftieth *Doktor-Jubiläum*.

In his declining years Jhering had amused himself by composing his most elaborate satire of constructive jurisprudence called "The Heaven of Juristic Concepts." He imagined that he had died and gone to the Heaven of Juristic Concepts. The theoretical jurists had a heaven separate and apart from the heaven of the practical jurists. The sun still shone in the heaven of the practitioners, which had even an atmosphere, but the heaven of jurisitic concepts was a cold, dark void in space. The sun was the source of all life but the concepts could not endure contact with life for they existed for themselves alone. Moreover the eyes of the theoretical jurists were accustomed to the dark like those of the owl of Minerva. In the heaven of juristic concepts are personified all the riddles of constructive jurisprudence. To make certain that he was free of earthly atmosphere Jhering had to undergo a quarantine before entering the Heaven of Juristic Concepts. There he found Puchta, who had been the first to enter. Savigny, who had never quite understood the art of construction, had had difficulty in securing admittance, but had finally succeeded on the strength of his work on the theory of possession and his *The Vocation of Our Time for Legislation and Jurisprudence.* Accompanied by a guide, Jhering made a tour of the heaven of juristic concepts, and discovered all sorts of marvelous machines and contrivances—a hair-splitting machine capable of splitting a hair into 999,999 accurate parts; a climbing pole so smooth that a ray of the sun could slide down it, and surmounted by three mastheads where juristic problems were placed that had to be brought down; a construction apparatus and a dialectic-hydraulic interpretation press with two pumps for infiltration and elimination; an excavation machine for digging deep into questions of law; and finally a giddy wall that rose to an immense height. Then Jhering and his guide toured the Academy of Legal History, where legal formulas and texts are restored and where sources were not only traced but invented, and the Hall of Concepts, which they entered not through a door but by butting their heads through the wall. In the Cerebrarium of the Hall of Concepts they find an anatomical-pathological cabinet of concepts. In the laboratory of the Cerebrarium was fashioned the brain-substance of the theoretical jurists, distinguished by the *mons idealis*, which enabled them to disregard practical consequences and to treat jurisprudence as a system of legal mathematics. It is impossible really to exhaust all the strange phenomena which existed in the Heaven of Juristic Concepts but Jhering awakened at last to find himself back on earth. It is certain, however, that when his death proved to be no dream, he entered rather the Heaven of Purpose and Interest, of Law as a Means to an End.

FPR NO. 1, AN EXPERIMENT IN STANDARDIZED AND PREFABRICATED LAW

REED DICKERSON*

TO DEAL fairly, fully, and at the same time understandably, with the gigantic problems of a government agency set up to regulate a major phase of the national economy, it is often necessary to go beyond orthodox legal techniques. This is especially true of an agency like the Office of Price Administration which is faced with regulatory problems of a kind and degree that have never before been faced. These are problems that are likely to persist wherever the government attempts to deal directly and comprehensively with the every-day activities of the market place.

Governmental regulation of business is nothing new; but never before has government dealt with an economy so complicated. Intricate regulations are likewise well known; but never before has government attempted to apply controls so involved and fast-changing directly to day-to-day business operations. Federal tax regulations, involving only periodic study and then mostly by lawyers, can be arranged and presented in traditional legal form, but complex orders like those establishing pricing methods for the 2,500 fruit and vegetable canners or the 550,000 grocers, which must be referred to continually and usually without benefit of counsel, call for methods of presentation that are better adapted to the needs of laymen.

The Office of Price Administration has dealt directly with this problem by attempting to issue regulations that are not only adequate "legally" but written for the non-lawyer. Progress has been made in simplifying style and in achieving greater clarity through the use of such devices as explanatory material and examples. Of equal importance, frontal attacks are continuing on the fundamental problems of structural organization. These have been sufficiently successful to promise solution of some of the regulatory problems that will probably accompany any further extension of direct governmental control over specific commercial operations.

A good example of these attacks is the story of how one major problem of "legal engineering" was dealt with in the Food Legal Branch of the Office of Price Administration. Basically, this involved the problem of how to coordinate a vast amount of regulatory material applicable to a line of

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grocery products without sacrificing the specialized treatment necessary to handling problems peculiar to individual commodities. The legal device developed for this purpose has not only done the job it was supposed to do but may serve as a model for the solution of similar problems elsewhere. Because it is essentially new in character and directly affects the operations of both government and the persons who are subject to regulation, it is believed that a brief explanation of the scheme may prove useful.

WHAT THE PROBLEM WAS

After the issuance of the General Maximum Price Regulation[1] in April, 1942, it became necessary to write a number of separate commodity regulations establishing maximum prices for many seasonal processed dry grocery products. This had to be done quickly. Regulations were written for canned vegetables (Maximum Price Regulation 152),[2] soups (MPR 181),[3] jams and jellies (MPR 226),[4] dried fruits (MPR 227),[5] apple butter (MPR 232),[6] apple products (MPR 233),[7] dried prunes and raisins (MPR 242),[8] pitted and macerated dates (MPR 243),[9] and miscellaneous products (MPR 262).[10] The commodity groupings were largely accidental; the order in which the regulations were issued depended mainly on the order in which the raw agricultural materials were harvested and processed. Commodities and commodity problems were dealt with as they arose, on a piecemeal basis. In other sections of the Office of Price Administration, the situation was frequently the same.

What impressed us most during 1942 was not so much the common problems shared by the various industries as the diversities among them. Each regulation tended to be written principally with the draftsman's eyes fixed on the commodity classification before him. There were, of course, common problems to be dealt with, many of which remained partially submerged until later in the year, but it was impossible to attain more than a bare minimum of uniformity beyond a few "boilerplate" provisions.

[1] 9 Fed. Reg. 1385 (1944). (Only the most recent Federal Register compilations are cited in this discussion. For present purposes, later amendments are not important.)

The General Maximum Price Regulation "froze" the prices of most commodities (at all levels of production and distribution) at the highest prices the particular seller charged during March, 1942. Although a necessary temporary expedient, it produced abnormal prices for most seasonal commodities. In addition, it squeezed distributors wherever their March selling prices reflected purchases made earlier at prices lower than the costs of replacement frosen in March.

[2] 7 Fed. Reg. 3895 (1942).

[3] 8 Fed. Reg. 2998 (1943).

[4] Ibid., at 2981.

[5] 7 Fed. Reg. 7531 (1942).

[6] 8 Fed. Reg. 2985 (1943).

[7] Ibid., at 4628.

[8] 7 Fed. Reg. 8354 (1942).

[9] Ibid., at 8478.

[10] Ibid., at 9244.

Among these were the prohibition clause ("don't charge more than ceiling prices"), the evasion clause ("don't evade the regulation"), the discounts and allowances clause ("continue your customary discounts"), the record-keeping clause ("keep making and preserving your usual records"), and several others that developed early and naturally. (A time-pressed draftsman is always grateful to find a usable paragraph he can borrow from an earlier regulation.)

Today it is easy to criticize the results of this piecemeal program. Yet it was a program required by the necessity of speed and comprehensive action. Mature development and full coordination had to bide their time.

When inventory was taken of the regulations covering the 1942 packs of these seasonal commodities, it was found that several things called for improvement. Common problems were receiving a diversity of treatment which, even where it did not raise questions of discrimination, created confusion both in the industry and within OPA itself. For instance, under MPR 152, a man who was a "canner" because he processed canned corn was also a "canner" of canned peas he handled only as a distributor, whereas under MPR 207 a man who processed frozen corn was a "primary distributor" of frozen peas he handled in that way. Under MPR 185, a cooperative canner "borrowed" a ceiling price from his closest non-cooperative competitor; under MPR 207, a cooperative freezer "borrowed" only a raw material cost increase. And so on. These were minor discrepancies but they needed correction.

Secondly, there seemed to be (at least on the surface) too many regulations. Why have one regulation on canned fruits, another on canned apple products, another on apple butter, another on jams and jellies? The greater the number of regulations, the more frequently common problems must be dealt with and the greater the repetition and the risk of unintended discrimination. In addition, the more regulations there are to be amended whenever a standardized provision is being changed, the more amendments there are to be written, typed, cleared, printed, and distributed. In a large-volume war agency, where amendments are a daily, almost hourly, occurrence, this means a serious loss of time.

In 1943 a higher degree of standardization was achieved. In the writing of regulations for the 1943 packs, it was possible to select from the 1942 regulations those provisions that seemed to have worked best. However, even then adequate standardization was not immediately attainable because what worked adequately for the early-pack commodities often required improvement for later commodities. The development of the provisions covering "primary distributors" is a good example. This problem

was first dealt with, somewhat crudely, in MPR 326 (macaroni products).[11] Generally similar provisions were later included in MPRs 335 (peanut products),[12] 427 (processed beans),[13] and 428 (cider vinegar).[14] However, mature treatment of the problem was not achieved until Amendment 12 to MPR 306 (canned fruits and vegetables),[15] and the pricing technique adopted in that amendment was further refined in later regulations like MPR 462 (prepared flour mixes).[16]

The important thing is that, although a satisfactory treatment of the primary distributor problem was finally developed, time was too short to permit cleaning up the inadequacies of the earlier regulations. New regulations had to be written, and in a hurry. These included not only regulations covering the 1943 packs of products for which special regulations had been written in 1942 but regulations like those named in the preceding paragraph covering commodities that had previously remained under the General Maximum Price Regulation.

However, the year 1943 permitted a more forthright approach in some areas to the problems of the diversity and multiplicity of regulations.

The answer to both problems seemed to be the same: consolidation. By combining regulations, one can automatically standardize and, of course, reduce the total number of regulations to be serviced. One modest example was MPR 306,[17] which combined canned fruits and canned vegetables of the 1943 pack and certain related canned products like canned mushrooms, sauerkraut, etc. Before, the canner of fruits and vegetables dealt with two or more regulations; now he dealt with one.

A more pretentious attempt at consolidation was MPR 426,[18] which applies generally to fresh fruits and vegetables. This regulation brought together a large number of fresh fruits and vegetables that were diverse enough to be handled under different pricing methods, but shared a large enough number of common problems to warrant making them bedfellows. Common provisions (general explanation, prohibition clause, definitions of terms like "pool car," "carlot sale," "wholesale receiving point," "freight," etc.) were set up in the body of the regulation itself. Specific pricing provisions, however, were set forth in a number of appendices, where commodities were grouped for pricing purposes. For example, Ap-

[11] 8 Fed. Reg. 2098 (1943).
[12] Ibid., at 2502.
[13] Ibid., at 9775.
[14] Ibid., at 10358.
[15] Ibid., at 10824.
[16] Ibid., at 12181.
[17] 9 Fed. Reg. 12451 (1944).
[18] 10 Fed. Reg. 8021 (1945).

pendix G was devoted to apples, Appendix H to miscellaneous winter vegetables, Appendix I to citrus fruits, and so on.

In the administration of these attempts to simplify and consolidate, OPA learned certain fundamental principles of organization. One of these is that physical consolidation does not necessarily mean greater workability and comprehensibility. Consolidation solves some of the problems of standardization but it creates new and equally difficult ones. For one thing, differences in pricing methods cannot always be successfully reconciled within the compass of a single instrument without causing confusion. For example, in some instances dollars-and-cents pricing and formula pricing require basic approaches that cannot be stated in a single integrated regulation without needless difficulty. This was particularly true of MPR 306, which combined dollars-and-cents prices and "freeze" prices for canned fruits and vegetables of the 1943 pack.[19]

The establishment of maximum prices for a large number of processed dry groceries involves a multiplicity of pricing methods, which must be adapted to the various commodities. This multiplicity does not become greater when separate pricing methods are stated in separate documents nor is it lessened when a single document is used. The hard fact is that these diversities inhere in price control and no amount of "simplification" can reduce them below a certain minimum. Moreover, there is no virtue in collecting in a single document pricing methods addressed to diverse groups of sellers that have nothing in common. An industry devoted primarily to canned fruits and vegetables, for example, would be unnecessarily annoyed by a regulation encumbered with pricing schedules on tobacco and beer. In short, one document is not always simpler than two. On the contrary, it was found advisable to issue three separate regulations covering wholesale and retail sales of dry groceries, instead of one or even two.

This, then, was the dilemma. On the one hand, the Food Price Division was tempted to write a separate price regulation for each group of food commodities requiring individual treatment or made by a different industry. On the other, the Division was under pressure to emphasize the recurring problems and lump otherwise divergent pricing methods into common regulations. Nor were the difficulties lightened by frequent insistence that the Division go both directions at once!

Yet it did just that.

[19] A dollars-and-cents provision specifically names the maximum prices applicable to the commodity. A "freeze" pricing method states that the maximum prices for the commodity are to be determined separately by each seller on the basis of the prices he charged during a named base period (e.g., "the first 60 days after the beginning of the 1941 pack").

MEETING THE PROBLEM

Food Products Regulation No. 1[20] and its family of supplements represents an attempt to resolve the fundamental dilemma existing in some fields between the wish for consolidation and the necessity of treating different problems differently.

In this case, the conflict was resolved by combining the best features of both approaches and minimizing their limitations. To accomplish this, each regulation considered for membership in the plan was divided into two parts: (1) "boilerplate" provisions and (2) provisions peculiar to the commodity group. The recurring provisions were segregated, standardized and stated in a single autonomous pricing document, issued as Food Products Regulation No. 1. The nonrecurring provisions were stated separately from the master regulation and separately from each other according to their natural groupings. Each of these separate documents was issued as a "supplement" to the master regulation.[21] Thus, Supplement 1[22] covers macaroni products; Supplement 6,[23] frozen fruits and vegetables; Supplement 7,[24] canned fruits and vegetables; Supplement 9,[25] dried fruits; and so forth. In this way, the common provisions were dealt with as a unit, while the individual pricing methods were handled on an individual basis.

This approach somewhat resembles that of the "appendix" type of regulation, which in its main body contains the common-denominator provisions and in its appendices lists the pricing tables or methods that need to be kept functionally apart. However, the appendix type of regulation has technical limitations that often become acute when a large number of complicated pricing methods is involved. For one thing, appendices are legally part of the regulation and therefore cannot be frequently amended without causing confusion. (Amendments have to be numbered consecutively and cannot be grouped according to the appendices or basic provisions to which they are applicable.) Moreover, it is ordinarily necessary to amend the main body of the regulation whenever a commodity is added to or withdrawn from an appendix. Likewise, the addition or deletion of an appendix itself normally involves a similar adjustment in the main body of the regulation. The larger the number of appendices and the com-

[20] 9 Fed. Reg. 6711 (1944).

[21] It was suggested that the individual pricing documents be called "adopting regulations," but the term "supplement" was less novel and better suggested the family-of-regulations idea, with stronger emphasis on the master regulation.

[22] 9 Fed. Reg. 6720 (1944).

[23] Ibid., at 8057.

[24] 10 Fed. Reg. 1750 (1945).

[25] 9 Fed. Reg. 11794 (1944).

modities covered by them, the more complicated the problem of integrating the regulation, including the maintenance of an intricate system of headings and cross references that contribute to administrative inflexibility. For all these reasons, it was believed important to keep the supplements to FPR 1, as well as the master document, completely autonomous documents in order to maintain the highest degree of flexibility. Appendix K is a part of MPR 426, but Supplement 7 is *not* part of FPR 1.[26]

The second important feature of FPR 1 is the manner in which its substantive provisions are respectively combined with those of its supplements to form, in each case, a working whole.

In gathering into a single document the provisions most commonly used in price regulations for processed dry groceries, consolidation of the largest possible number of recurring provisions for the largest possible number of commodities was the goal. This, again, involved a dilemma. If only provisions applicable to all commodities had been included, the master regulation could have covered only a small number of commodities. Conversely, if under these conditions inclusion of a wide group of commodities had been sought, the number of recurring provisions would have been too small to justify segregation. Frequency charts were therefore constructed showing the extent to which various types of provisions being used recurred in the regulations being considered for consolidation. The inclusion in FPR 1 of a number of provisions for which these charts showed large, although not universal, applicability greatly enlarged its usefulness. This meant, of course, that some of the "boilerplate" provisions did not apply to some of the supplements.

It was because of this difficulty that a unique feature of FPR 1 was adopted. Instead of making it apply to a number of "supplements," which are incorporated by reference and which in turn spell out exceptions to forestall the application of inappropriate provisions, the normal order of incorporation by reference was reversed. Thus, FPR 1 has force only to the extent that its terms have been incorporated by its supplements. Taken by itself, the regulation names no prices, applies to no one and, in fact, has no legal force whatsoever! It lives only to the extent that supplements breathe life into its provisions by specifically adopting them. It is this use of *inverted and selective incorporation by reference* that gives the regulation its great flexibility. Many or few supplements can adopt all or part of its provisions, even in varying combinations, without the need of a single amendment to the master document itself.

[26] The appendix type of regulation, of course, remains in many cases a useful device for presenting generally uniform pricing methods using a substantial amount of tabular material.

The toleration in FPR 1 of a certain amount of surplusage, that is, "boilerplate" provisions of less than 100 per cent applicability, created no greater disadvantage than is already met in many regulations of the "appendix" type, where experience has shown the frequent necessity of including a clause to the effect that "if any special provision is contrary to or inconsistent with any general provision, the special provision shall be controlling."[27] FPR 1 frankly recognizes the normal impossibility of writing any comprehensive document of 100 per cent applicability without making such exceptions. Troublesome questions of the applicability of the general provisions to specific situations are largely avoided because each supplement forthrightly states which general provisions are applicable and (by necessary implication) which are not.

To summarize, the essential plan of Food Products Regulation No. 1 and its family of supplements is built upon three basic principles:

(1) The basic regulation, as distinct from its supplements, is an autonomous document, printed and administered separately from its supplements.

(2) Each supplement, in addition to being separate from the basic regulation, is an autonomous document, printed and administered separately from other supplements.

(3) The basic regulation applies to a given group of commodities only to the extent that the applicable supplement expressly adopts its provisions.

With these three points in mind let us examine the documents themselves.

FPR 1 IN ACTION

The master regulation consists of an "Explanation" and 46 sections. The Explanation gives a short account of the general scheme and indicates that the reader is to get his bearings from the applicable supplement. Article I includes 14 sections, each giving a definition of some general term, like "processor," "primary distributor," or "customary receiving point." Article II includes 16 sections, each a separate pricing provision of a general nature. Selecting at random, section 2.2 gives a method for converting a price for a product in tin to a price for the same product in glass; Section 2.11 gives the rules for payment of brokers; Section 2.15 covers units of sale and fractions of a cent; and so on. Article III covers miscellaneous boilerplate provisions not affecting maximum prices. Thus, section 3.6 names certain records the seller must keep; section 3.9 explains the effects of transferring a business or stock in trade.

[27] See, for example, Section 1(d) of MPR 426 and Section 1341.551(c) and (d) of MPR 306.

Taken by itself, Food Products Regulation No. 1 is hardly stimulating reading. Except for the explanatory material at the beginning, and the general grouping of the sections into three articles, the regulation is a singularly disjointed affair. But FPR 1 is not a document to be read by itself. It gives only the missing pieces in the puzzle. Functionally, the seller does not begin with the master regulation. He starts with the particular supplement that applies to him. Both documents are slanted accordingly.

Here is how it works in practice. A processor makes certain macerated date products. He gets copies of FPR 1 and Supplement 4.[28] Supplement 4 (like all the other supplements) starts off in Article I by telling him (1) what products it applies to, (2) what sellers it applies to, (3) where it applies, (4) what regulation it supersedes, and (5) when it is effective. In a standardized section 2, it next tells him to remember that some of the provisions of FPR 1 have been made a part of the regulation and that these provisions are listed later in the supplement. Section 3 defines the terms "pitted domestic dates," "macerated domestic dates," and "domestic date products," and concludes with a list of the words defined in FPR 1 that apply to Supplement 4.

Article II, which in every supplement is devoted to pricing methods, consists of a section naming specific dollars and cents maximum prices for sales by processors and distributors other than wholesalers and retailers, followed by a section listing those pricing provisions in Article II of FPR 1 that apply to this supplement.

Article III covers miscellaneous provisions. For this supplement no special miscellaneous provisions were needed, so that Article III contains only a section that lists the applicable miscellaneous provisions of FPR 1.

Altogether, Supplement 4 covers barely more than one page. It tells the processor almost all he needs to know for his day-to-day operations. It also tells him what kind of applicable material is to be found in FPR 1.[29] Thus, instead of dealing with a much longer document largely containing material that is of only occasional interest, the processor works with a more usable regulation.[30]

[28] 9 Fed. Reg. 6726 (1944).

[29] It might have been easier to list in the supplement those sections of FPR 1 that were *not* adopted, but in that case the reader would have had to make unnecessary trips to FPR 1 to find out what provisions *did* apply. It was also felt that the supplement would be more usable if a separate list (instead of one over-all list) were used in each article at the place where questions of applicability would arise.

[30] The supplements vary in length, naturally. All but four are three pages or less. Supplement 6 (frozen fruits and vegetables) is about seven pages long; Supplements 7 and 13 (canned fruits and vegetables), which use a highly complex pricing method, about thirty-seven, and fifty, respectively; Supplement 15 (jams and jellies), nine.

If he adds certain canned apple products to his line, the processor obtains Supplement 10;[31] if he adds packaged breakfast cereals, he obtains Supplement 11.[32] He tailors the regulation to his own needs and avoids dealing with regulations covering commodity groups in which he has no interest.

Occasionally, reference will have to be made to FPR 1 itself, but no matter how many supplements he is dealing with, he will find in FPR 1 a document that provides the same standardized provisions for all supplements.

SOME TECHNICAL PROBLEMS

There were times during the preparation of FPR 1 when it was felt that this was an impossible technical job. The basic idea behind the plan was simple enough, but making the pieces fit, without producing a result even more unwieldy than the original regulations, was a complicated problem, indeed.

Needless to say, a prodigious drafting job was involved in drawing standardized provisions so general and flexible that they could be used in almost all existing and future supplements, and yet specific enough that when they were incorporated in a supplement both documents adequately dovetailed.

The primary interest was to insure the greatest possible flexibility in adding, revoking, or changing particular supplements without changing the master regulation itself. To make it a completely passive or "neutral" regulation, a general title ("General Pricing Provisions for Certain Food Products (Group I)") was used, the supplements were referred to only through the abstract term "applicable supplement," and a carefully chosen list of generic terms was used throughout. For example, section 1.4 defines "repacker" as "a person, other than a processor, wholesaler, or retailer, who purchases the particular goods being priced and resells them after repackaging." Note particularly the terms "processor" and "particular goods being priced." Nowhere does FPR 1, or any supplement, refer to a "canner," "freezer," "dehydrator," "briner," "preserver." Instead, the broader term "processor" is used throughout the entire system, including the supplements themselves. The specific meaning of "processed" in each supplement is implied by the definition of the commodity itself. Also, FPR 1 refers to no specific commodity. It refers generally to the "product being priced" or "item being priced." This has caused no uncer-

[31] 9 Fed. Reg. 14851 (1944).

[32] 10 Fed. Reg. 2614 (1944).

tainty, because in practice the reader always has a particular commodity in mind as he reads the regulation.

Although the applicability of any section of FPR 1 depends on its incorporation into a supplement, the job of integrating the two documents in each case was complicated by the frequent necessity of providing in the supplement more than one type of pricing method or to price more than one kind of seller. Some standardized provisions are meant to apply to all sellers when incorporated in a supplement, whereas other sections are applicable to particular kinds only. The problem of restricted applicability could have been handled in each supplement at the place where the section is incorporated, but this would have complicated what was intended to remain a simple list of adopted sections. Instead, the beginning of each standardized pricing provision states what kind of seller it applies to when incorporated, and in some cases also what kind of pricing method it applies to.

For example, section 2.1, which permits a processor with two seasonal packs of a food product to figure prices separately for each pack, begins with the sentence, "This section applies only to processors." Section 2.2, providing for container type and size conversions, begins, "This section applies to processors and repackers," True, some of the supplements do not involve problems of repackers, but two extra words are slight payment for over-all clarity.

Section 2.6 tells the seller when he must figure a delivered price. It begins, "When this section applies to a supplement, it applies to all sellers covered by the supplement. However, it applies only to maximum prices based on sales which the seller made during a base period named in the supplement." It then goes on to state the pricing rules. This section, of course, would be adopted only by a supplement that used a "freeze"[33] method of setting ceiling prices. If such a supplement also established dollars-and-cents maximum prices, the draftsman would want to make it clear that the adopted section applied to "freeze" but not to dollars-and-cents ceiling prices. In addition to the desirability of keeping the supplement's list of incorporated provisions unencumbered, it is wise to spell out subtleties of this type in the incorporated section itself in order to make the master regulation as foolproof as possible in the hands of hurried or unsophisticated draftsmen preparing later supplements.

The paragraph quoted from section 2.6 also illustrates how another troublesome problem was dealt with. In a number of boilerplate sections, it was possible to standardize all but one or two minor parts. For example,

[33] Op. cit. supra, note 19.

the base periods used in "freeze" pricing methods vary widely. Instead of attempting to spell out specific base periods, section 2.6 simply refers to the "base period named in the applicable supplement." Thus, at the place where Supplement 2 (macaroni products)[34] lists section 2.6 of the master regulation as applicable, it adds, "The base period is March 1942." Similarly, section 2.9, which provides standardized pricing methods for primary distributors, limits their markups to the "markup named in the applicable supplement." Supplement 7, in adopting this provision, provides, "The maximum markup is 8%."[35]

HOW THE PLAN HAS WORKED OUT

Food Products Regulation No. 1 was issued on June 16, 1944. Since then there has been ample opportunity to test it. It appears to have been successful.

By and large, it has justified the claims made for it in the Statement of Considerations. Briefly, it has provided "the most flexible possible method of simultaneously dealing with similar problems similarly and different problems differently." Together with its supplements, it has greatly reduced "the total number of provisions under which the various industries covered by the plan are now operating." It has provided "the automatic standardization of all basic provisions included." This has helped to unify and coordinate OPA pricing techniques, keep each supplement automatically abreast of improvements in the basic provisions, and facilitate general compliance with the basic provisions. It has greatly reduced the time heretofore necessary to change any provision of general applicability.

In addition, it has facilitated the drafting of new regulations (supplements). FPR 1 provides the draftsman with 46 prefabricated provisions, and the existing supplements give him a ready-made general pattern into which he can fit the pricing provisions peculiar to the given commodity group. It also serves as a check-list to guard against the danger of forgetting important provisions of general applicability. This not only improves internal governmental efficiency but directly benefits the affected industry as well as the consuming public, if for no other reason than that it saves time.

Just how much time and paper have been saved is a matter for speculation. After more than a year there are sixteen supplements in operation.

[34] 9 Fed. Reg. 6722 (1944).

[35] A minor additional point: the master regulation was given an effective date mainly because the amendments to it, which serve as amendments to the supplements, require effective dates.

Each supplement is four to ten pages shorter than it would have been if it had been combined with the master regulation. To that extent they are more manageable. The master regulation itself has been amended only twice, but the important thing is that for each change the job had to be done once instead of sixteen times.

There is, however, one apparently vulnerable spot in the regulation. Objections have been raised against the necessity of having to refer to *two* documents for any given commodity: the master regulation and the applicable supplement. It is now believed that not only has this criticism been met but that this aspect of the plan has been turned into an advantage by drawing off less-used provisions into the master regulation and thus facilitating the day-to-day use of the supplements.

It is not generally understood that, so far as ease of understanding is concerned, the number of legal "documents" is irrelevant. The fact that OPA issued 202 maximum price regulations in 1943 has no bearing upon the simplicity and usability of these regulations. Even a single "regulation" may consist of many unattached pieces of paper. For instance, immediately before the compilation of MPR 426 following Amendment 57, there were at least forty-five different pieces of paper to be dealt with (the Amendment 12 compilation and subsequent amendments).[36] On the other hand, it is sometimes a disadvantage to integrate several documents. For example, if you handle only fresh vegetables, you will be interested in Appendix H of MPR 426, but you will not have much concern with the thirty-three pages that go to make up Appendices I, J, and K.

The real problem is not to have few or many regulations, or few or many separate sheets of paper, but to set up a well-ordered arrangement and to keep the burden of cross-references and surplusage to an absolute minimum. It is like planning a kitchen: you want to place each item so as to reduce the total number of steps as much as possible. In other words, the

[36] It is impossible for a government agency that must act fairly and quickly in a complicated economic field, where regulations are necessarily intricate, to avoid the frequent issuance of amendments. This is especially true of the Office of Price Administration, as it is required to operate under the Emergency Price Control Act. At any given time, therefore, a maximum price regulation is likely to consist of at least several pieces of paper. Because of the delay and expense involved, it has not been feasible to reprint the entire regulation in its amended form each time a change is made. (Several regulations have required a hundred or more amendments.) Therefore, compilations can be made only periodically. The longer the regulation, the longer it takes to issue a compilation (a minimum of several weeks is involved). If, in addition, amendments are currently being issued on an almost weekly basis, it becomes difficult to compile a long regulation at all (e.g., MPR 426). This is a source of frequent confusion or irritation. FPR 1 offers a substantial advantage in this respect. The basic regulation and the separate supplements, being autonomous documents, can be compiled separately and thus with much greater facility.

drafting job is satisfactory if it calls for the least possible page-turning. The real problem, then, was one of understandability and "findability," and not of how many separate "documents" were issued or whether pages were physically attached or not.

Instead of increasing the number of "documents," FPR 1 reduced it by including all relevant provisions of other miscellaneous documents that had theretofore affected the sellers involved. Thus, it includes certain definitions from the Emergency Price Control Act and General Maximum Price Regulation that before had usually been incorporated by reference and a number of supplementary orders that were not normally incorporated and therefore occasionally served as a trap for the unwary. Because of this, and the fact that the plan facilitates compilation, there has been a net reduction also in the number of separate pieces of paper that must be handled by the reader.

As added precautions, the following steps were taken:

1.) The master regulation and the supplements were arranged so that they paralleled each other in general arrangement of subject matter.

2.) Large section numbers (to catch the eye) were used in the offset copies of the master regulation that were circulated to the public.

3.) To avoid possible confusion between the section numbers of the master regulation and those of the supplements, a decimal system of numbers was used in the master regulation (e.g., section 1.1, section 1.2) and ordinary whole numbers in the supplements.

4.) Throughout, many features of style simplification and clear presentation were adopted. Presentation in a straightforward, economical style was supplemented at appropriate places with explanatory material and examples, as well as with helpful typographical devices of paragraphing, headings, and italics.[37]

In more than a year of use, it has been gratifying to see that the complexities of execution and draftsmanship did not result in complexities of operation and use. FPR 1 and its supplements have proved themselves, on the whole, an effective and smoothly working system.

WHERE DO WE GO FROM HERE?

What does the plan of FPR 1 offer outside the field of processed dry groceries?

So far, four other master regulations (for grains and feeds) have been

[37] The prevention of "gobbledygook," or "legal fruit cake," in OPA regulations is a separate story. Credit is due such simplifiers as David Cavers and Rudolph Flesch for the strides OPA has been making toward a clearer presentation of regulatory materials.

set up on similar lines. They suggest that the situation for which this plan is suited may recur in other fields and that adaptation of the FPR 1 technique may offer a possible solution to some common organizational drafting problems.

At an early stage in the development of FPR 1, the Denver Regional Office of the Office of Price Administration adopted the scheme for its retail community food pricing orders. The master order was called "Basic Community Pricing Order No. B-1,"[38] and individual schedules of prices were issued as separate orders "adopting" the general provisions of the basic order. This plan has recently been put on a national basis. As explained in the applicable Statement of Considerations, "In the administration of the national community dollars-and-cents ceiling price program, District and Regional Offices were required to issue orders of local applicability. In most cases, separate orders were required for separate phases of the program, because of the nature of the commodities covered by the phase and the frequency of price changes. It has been observed that many provisions of these local orders are or can be made identical. It has therefore been possible to segregate and standardize the provisions which are common to the greatest number of local community pricing orders issued under Revised General Order, No 51. These provisions are issued as "Food Products Regulation No. 4." The particular pricing orders are referred to as "adopting orders" in the master regulation.

Food Products Regulation No. 4,[39] therefore, has extended the original plan and made it a means of coordinating the work of the national, regional and district offices in a field where many provisions can and should be standardized, while others must be given individual and localized treatment.[40] This means great savings in time, paper, printing, and distribution labor, because the individual adopting orders involving perishables are issued weekly or monthly for distribution to all retailers, while the basic order needs to be distributed only once.

How many additional uses there may be for the plan of FPR 1, in similar or varied form, can hardly be anticipated at this time. However, the general expansion of government activities suggests that the idea may well be worth exploitation in fields other than that of price control.

[38] On file with the Federal Register.

[39] 10 Fed. Reg. 4103 (1945).

[40] Under FPR 1, each supplement is issued by the national office and covers one group of commodities in all areas. Under FPR 4, each "adopting order" is issued by a regional or district office and applies to all commodities covered by that plan, but in the particular area only.

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CASE NOTES

Insurance—Liability Insurer's Duty to Settle—[Illinois]. The defendant insurance company issued a public liability policy to the plaintiff country club, with liability limited to $10,000 for bodily injuries to any one person. An invitee on the plaintiff's premises sustained injuries on a toboggan slide and brought suit against the plaintiff. Before trial the insurance company refused an offer by the injured party to settle for $3,500. The claimant recovered a judgment for $20,000. Before appeal she offered to settle for $8,000, and was again refused. The judgment was affirmed by the Appellate Court.[1] The defendant paid the claimant $10,815. The plaintiff paid the balance due on the judgment and sued to recover that amount from the defendant. The trial court instructed the jury that "when defendant . . . . arbitrarily and unreasonably refused to compromise . . . . it failed to exercise good faith." The jury found for the plaintiff. On appeal, *held*, the trial court should have left to the jury the question whether the refusal to settle was in "bad faith." Judgment reversed

[1] Halladay v. Olympia Fields Country Club, 295 Ill. App. 622, 15 N.E. 2d 345 (1938).

and remanded for new trial. *Olympia Fields Country Club* v. *Bankers' Indemnity Insurance Co.*[2]

The insurer by the terms of the usual accident-liability policy has complete control of the defense of any claim arising under its terms, including the right to settle or compromise any claim against the insured.[3] Such control may be referred to in the contract as an "option to settle,"[4] an "exclusive right to contest or settle,"[5] or "the entire management and defense of the suit";[6] and the assured is usually forbidden to "interfere in any negotiation for settlement"[7] or "assume any liability"[8] without the consent of the insurer.

Justification for this exclusive control is said to rest upon the probability that, if the insurer did not retain management of the defense af all claims, the assured would seek to compromise any claim below the liability limit.[9] The courts have recognized that there is an unavoidable conflict of interest between the insurer and the assured when an offer of settlement by the injured party is for an amount below the maximum coverage of the policy.[10] The assured will want to accept any such settlement

[2] 325 Ill. App. 649, 60 N.E. 2d 896 (1945).

[3] In the Olympia Fields case the contract provided: "In addition to the Above the Company Agrees: (2) To Make Such Investigation at its own cost of all accidents reported to the Company to which this Policy applies, and to undertake such negotiations for settlement, or to make such settlements of any claims for damages made against the Assured, as the Company may deem expedient; and in the event of suit being brought against the Assured on account of such an accident, to defend such suit, even if groundless, in the name and on behalf of the Assured, unless or until the Company shall elect to effect settlement thereof." Ibid., at 651 and 897.

[4] Brassil v. Maryland Casualty Co., 210 N.Y. 235, 104 N.E. 622 (1914).

[5] Lanferman v. Maryland Casualty Co., 222 Wis. 406, 267 N.W. 300 (1936); City of Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929).

[6] American Mutual Liability Ins. Co. v. Cooper, 61 F. 2d 446 (C.C.A. 5th, 1932).

[7] Hilker v. Western Automobile Ins. Co., 204 Wis. 12, 235 N.W. 413 (1931), affirming 204 Wis. 1, 231 N.W. 257 (1930).

[8] Farmers Gas Co. v. St. Paul Mercury Indemnity Co., 186 Miss. 747, 191 So. 415 (1939). Exclusive control of the defense or settlement of any claim by the insurer applies only to claims for an amount less than the policy limit. The assured may compromise his own possible liability in excess of the maximum coverage of the policy. Gen'l Accident Fire & Assur. Corp. v. Louisville Home Telephone Co., 175 Ky. 96, 193 S.W. 1031 (1917); see City of Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929).

[9] See Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 293, 170 S.E. 346, 348 (1933); Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 14, 235 N.W. 413, 414 (1931).

[10] See Abrams v. Factory Mutual Liability Ins. Co., 298 Mass. 141, 143, 10 N.E. 2d 82, 83 (1937); Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 292–93, 170 S.E. 346, 348 (1933); Georgia Casualty Co. v. Mann, 242 Ky. 447, 451, 46 S.W. 2d 777, 779 (1932); Douglas v. United States Fidelity & Guaranty Co., 81 N.H. 371, 377, 127 Atl. 708, 711 (1924). But see Traders & Gen'l Ins. Co. v. Rudco Oil & Gas Co., 129 F. 2d 621, 627 (C.C.A. 10th, 1942), referring to the "common interests" of the parties.

regardless of the possibility of obtaining a judgment for a lower amount; he can only lose by contesting. The insurer, on the other hand, may believe the chance of obtaining a judgment for an amount smaller than the proffered settlement, or even a complete discharge on the merits of the case, justifies a refusal to compromise. The certainty of this conflict becomes more obvious as the offer tends to proximate the maximum coverage of the policy.[11]

The courts have agreed that the insurer does have certain obligations to the assured, not explicit in the terms of the policy.[12] To prevent the insurer from taking advantage of its complete control over the defense or settlement of the claim courts have sometimes held it liable for the entire amount of any judgment subsequently entered or affirmed, even though the amount exceeded the maximum coverage of the policy. The courts have struggled to establish a standard by which the decision of the insurer to refuse a settlement below the policy might be measured. In some cases the liability of the insurer to the assured has been predicated upon the "negligence" of the insurer in failing to accept a proffered settlement.[13] The test of negligence as used to assess the failure of the insurer to make a careful investigation[14] or accept the advice of its investigators[15] is inadequate to resolve the conflict of interest between insurer and assured when a settlement offer is below the face of the policy. The decision of the insurer to litigate rather than settle will inevitably increase the risk to the assured regardless of the "reasonableness" of the insurer's decision.[16]

[11] In the principal case the refusal of the insurer to accept the $3,500 settlement offer meant that it was risking the loss of an additional $6,500 against a maximum possible gain of $3,500. When the offer was $8,000 a refusal to settle meant that the insurer stood to lose only $2,000 by contesting, while, if the appellate court reversed the award of $20,000, it would gain $8,000. The risk to the assured was greater at the time of the $8,000 offer, since the lower court had already entered judgment for $20,000.

[12] See cases cited in notes 13 and 17, infra.

[13] Douglas v. United States Fidelity Guaranty Co., 81 N.H. 371, 127 Atl. 708 (1924); Ballard v. Ocean Accident & Guarantee Co., 86 F. 2d 449 (C.C.A. 7th, 1936); Maryland Casualty Co. v. Wyoming Valley Paper Co., 84 F. 2d 633 (C.C.A. 1st, 1936). A few courts have held that a showing of negligence is not sufficient to hold the insurer liable for failure to accept a settlement below the maximum coverage of the policy. Abrams v. Factory Mutual Liability Ins. Co., 298 Mass. 141, 10 N.E. 2d 82 (1937).

[14] Ballard v. Ocean Accident & Guarantee Co., 86 F. 2d 449, 452 (C.C.A. 7th, 1936).

[15] City of Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929).

[16] The courts that apply the "negligence" test say it is the duty of the insurer to settle the claim if it is the "reasonable thing to do." Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 294, 170 S.E. 346, 349 (1933); Cavannaugh Bros. v. Gen'l Accident, Fire & Life Assur. Corp., 79 N.H. 186, 104 Atl. 604 (1919). It is difficult to tell what this means. The risk of litigation may be "reasonable" from the point of view of the insurer though "unreasonable" as far as the assured's interests are concerned. Note 11, supra.

More frequently it is said that the test is whether the insurer acted in "good faith" toward the assured in deciding to contest, rather than settle, the claim.[17] The standard of good faith has not been satisfactory. As observed in the principal case[18] the decisions are in "hopeless disagreement" as to when the refusal of the insurer to accept settlement will constitute "bad faith."[19] The test of good faith seems to imply a duty on the part of the insurer to consider the interests of the assured.[20] One explanation for the confusion may be the failure of the courts to recognize that, if good faith means "due regard for" the assured's interests,[21] the refusal of the insurer to accept any offer below the policy limit is, in itself, an act of bad faith toward the assured.

The standard of good faith has apparently developed out of the belief that the relationship between the insurer and the assured is that of agent and principal.[22] In the attempt to stake out the limits of an insurer's liability for a failure to settle, the courts have borrowed from the law of agency a yardstick that was not designed to measure the rights and duties of the parties to an insurance contract. The agent-principal relationship does not inexorably involve a conflict of interest between the agent and his principal. A conflict *may* arise between them, but, unlike the limited-lia-

[17] Traders & Gen'l Ins. Co. v. Rudco Gas & Oil Co., 129 F. 2d 621 (C.C.A. 10th, 1942); Berk v. Milwaukee Automobile Ins. Co., 245 Wis. 597, 15 N.W. 2d 834 (1944); Maryland Casualty Co. v. Cook O'Brien Construction Co., 69 F. 2d 462 (C.C.A. 8th, 1934), cert. den. 293 U.S. 569 (1934); Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930).

[18] Olympia Fields Country Club v. Bankers Indemnity Ins. Co., 325 Ill. App. 649, 660, 60 N.E. 2d 896, 901 (1945).

[19] ". . . . the disagreement results from a difference of opinion as to the nature and kind of proof that the insured must introduce to make out a prima facie case of bad faith against the insurer," ibid.; see Johnson v. Hardware Mutual Casualty Co., 109 Vt. 481, 494, 1 A. 2d 817, 822 (1938); City of Wakefield v. Globe Indemnity Co., 246 Mich. 645, 651, 225 N.W. 643, 645 (1929).

[20] Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 291, 170 S.E. 346, 348 (1933) (the insurer must "*sacrifice its interests in favor of those of the insured*"); Georgia Casualty Co. v. Mann, 242 Ky. 447, 451, 46 S.W. 2d 777, 779 (1932) (the insurer "may look to its own interests as well as those of the insured"); American Mutual Liability Ins. Co. v. Cooper, 61 F. 2d 446, 447 (C.C.A. 5th, 1932). But see Hilker v. Western Automobile Ins. Co., 204 Wis. 12, 235 N.W. 413 (1931), where the court said the insurer need look only to its own interests. The court, however, held that the failure to settle was in bad faith, implying that the insurer should have considered the interests of the assured; see Abrams v. Factory Mutual Liability Ins. Co., 298 Mass 141, 145, 10 N.E. 2d 82, 83 (1937).

[21] Johnson v. Hardware Mutual Casualty Co., 109 Vt. 481, 491, 1 A. 2d 817, 820 (1938).

[22] Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 7, 231 N.W. 257, 259 (1931), overruling on this point Wisconsin Zinc Co. v. Fidelity & D. Co., 162 Wis. 39, 52, 155 N.W. 1081, 1086 (1916); see Douglas v. United States Fidelity & Guaranty Co., 81 N.H. 371, 376, 127 Atl. 708, 711 (1924); Traders & Gen'l Ins. Co. v. Rudco Oil & Gas Co., 129 F. 2d 621, 627 (C.C.A. 10th, 1942); Ballard v. Ocean Accident & Guarantee Co., 86 F. 2d 449, 453 (C.C.A. 7th, 1936); but see Georgia Casualty Co. v. Mann, 242 Ky. 447, 451, 46 S.W. 2d 777, 779 (1932).

bility contract, the agreement between the parties does not by its very terms forecast a conflict of interest. The adverse interest of the agent who buys in the market at the same time that he buys for his principal,[23] or who acts as agent for a seller as well as agent for a buyer,[24] does not inhere in the contract relation between the parties. The standard of good faith as employed to judge the acts of an agent should not be carried over into the field of insurance law.[25]

The confusion is not relieved by passing on to the jury, as in the principal case, the task of deciding whether the failure to settle was in "bad faith."[26]

One way out of the present uncertainty would be to require the insurer to pay the full amount of any judgment rendered subsequent to a refusal to accept an offer of settlement below the maximum coverage of the policy. The point is not that the insurer must accept every offer of settlement which is below the policy limit. Rather, it would appear reasonable that, if the insurer insists upon complete control of the defense or settlement of any claim, it should be willing to assume the risks as well as claim the benefits resulting from its decision to litigate rather than settle. Under the current rules the insurer, at the best, cannot avoid being influenced by the knowledge that, if it makes a bad guess as to the outcome of the litigation, it need not bear all the consequent financial burden. At the worst, the insurer will deliberately gamble with the assured's money, forcing the assured to prove, in a separate action, that the failure to settle was in bad faith. The nearer the offer is to the policy limit, the less the insurer has to lose by contesting the claim, though court costs and lawyers' fees may be, in any case, some deterrent to rash action by the insurer.

The result of such a departure from the present confusion is not so shocking as might at first appear. In at least one case, the terms of the liability policy provided that if the insurer refused an offer of settlement below the maximum coverage of the policy the coverage of the policy would be doubled.[27] The fact that in this case the assured was a railroad corpora-

[23] Rest., Agency § 393, Comment (b) (1933).

[24] Ibid., § 392.

[25] But see Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 6, 231 N.W. 257, 259 (1930).

[26] But see Douglas v. United States Fidelity & Guaranty Co., 81 N.H. 371, 374, 127 Atl. 708, 710 (1924).

[27] "It is further agreed and understood that when the company has the opportunity to settle the claim of any injured employee within the limit designated in this policy, viz., five thousand dollars ($5,000), and fails to take advantage of such opportunity for settlement within the time provided in the preceding paragraph, the company shall thereafter protect the assured from any judgment not in excess of ten thousand dollars. . . . . " Georgia Life Ins. Co. v. Mississippi Cent. R. Co., 116 Miss. 114, 116, 76 So. 646, 647 (1917).

tion suggests that the more common provisions giving the insurer complete control without additional financial responsibility for an error in judgment simply reflect the inferior bargaining position of most policy holders.[28] Courts do take notice of the superior bargaining position of most insurers.[29] If higher premiums were the result of imposing full responsibility upon the insurer, where settlement offers below the policy limit are refused, such a consequence would not be contrary to a public policy favoring greater distribution of risk.[30]

The practical consequences of such a step probably would be the redrafting of insurance contracts expressly to exempt insurers from such unlimited liability. This effect might be sufficient justification for a harsher rule, if it called attention to the consequences of placing complete control in the hands of the insurer. In any case, the contract should provide expressly for the rights and duties of the parties in the event that the insurer refuses to accept a settlement offer below the face of the policy.[31] Who shall bear the risk of the decision to contest rather than settle a claim should not be determined by reference to vague notions of "good faith" or "reasonableness." Judicial reluctance to discard the good faith test,[32] however inappropriate, suggests that any radical departure from current rules will have to be taken by the legislature.[33]

If courts continue to demand, as the Illinois court did in the principal case, that juries try to determine whether or not a refusal to settle was in

[28] "In this case the insurance company no longer holds the assured 'in the hollow of its hands,' " ibid., dissent, at 135 and 653; see Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 293, 170 S.E. 346 (1933), referring to the insurer's exclusive power to settle or contest as a "heads I win; tails you lose" proposition.

[29] Ehrenzweig and Kessler, Misrepresentation and False Warranty in the Illinois Insurance Code, 9 Univ. Chi. L. Rev. 209 (1942).

[30] Douglas, Vicarious Liability and Administration of Risk, 38 Yale L. J. 584, 720 (1929); Loss Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case, 8 Univ. Chi. L. Rev. 729 (1941).

[31] See Best Building Co. v. Employers Liability Assur. Corp., 247 N.Y. 451, 456, 160 N.E. 911, 913 (1928). If most assureds are not in a strong enough bargaining position to demand double indemnity in the event that the insurer refuses a settlement offer, the contract might provide that if the insurer decides to contest rather than settle a claim, it will pay half of the amount by which any subsequent judgment is above the liability limit.

[32] In some of the early cases assureds asserted that the refusal to settle, ipso facto, placed the burden of any subsequent judgment upon the insurer. The courts said that such unlimited liability could not be read into a limited liability contract. Rumford Falls Paper Co. v. Fidelity & Casualty Co., 92 Me. 574, 43 Atl. 503 (1889); Georgia Casualty Co. v. Cotton Mills Product Co., 159 Miss. 396, 132 So. 73 (1931).

[33] For a discussion of legislation designed to readjust the rights and duties of the parties under other provisions in insurance contracts see Ehrenzweig and Kessler, op. cit. supra, note 28; Statutes Affecting Representation in Insurance Contracts, 32 Col. L. Rev. 522 (1932).

bad faith, the attention of the jury should be drawn to the fact that a refusal to settle by the insurer was not accompanied by an assumption of all the risks of such a decision even though the insurer had complete control over the management of the defense or settlement of the claim. Furthermore, it should be proper for a trial court to point out to the jury that the proximity of the settlement offer to the maximum coverage of the policy might influence the insurer's decision to contest, rather than to settle, a claim.[34]

HERBERT N. WOODWARD*

Conflict of Laws—Torts—Rules in Phillips v. Eyre—[Canada].—The plaintiff and the defendant were residents of Quebec. The plaintiff, in Quebec, accepted the defendant's invitation to make a trip to Ottawa as a gratuitous passenger in the defendant's automobile. In an accident, which happened in Ontario when the defendant, in rainy weather, was driving down a hill at great speed, the plaintiff was injured. An action for damages was brought in Quebec. An Ontario statute expressly exempts the driver of an automobile from liability to a passenger;[1] under another statutory provision of Ontario a person "who drives a motor vehicle on the highway without due care and attention" is guilty of an offense, and is punishable by fine or imprisonment.[2] Under Quebec law the negligent driver of an automobile is liable to a gratuitous passenger.[3] The Supreme Court of Quebec affirmed a judgment in favor of the plaintiff, and its decision was affirmed by the Supreme Court of Canada. *McLean* v. *Pettigrew*.[4]

The case illustrates the difference between the British and the American approach to tort cases involving problems of conflict of laws. An American court, applying the rule that problems of the law of torts are to be decided under the law of the place where the alleged wrong took place,[5] would almost certainly have applied to the case the law of Ontario, where the accident occurred. English courts have not found it necessary to decide tort cases brought before them under any foreign law. Rules of jurisdiction may preclude an action from being brought in England at all, for instance, when the defendant neither resides in England nor can be personally served there. If, however, the action can be brought in England, the court will decide it under its own law. If, under an

[34] Note 11, supra.

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[1] Highway Traffic Act, § 47(2). [2] Highway Traffic Act, § 27.

[3] In an extensive discussion of decisions of Quebec courts, French cases, and French textwriters, this liability was held to be based upon tort (quasi-délit) rather than upon a contract of gratuitous transportation (contract de bienfaisance); per Taschereau, J. [1945] 2 D.L.R. 65, at 66–76.

[4] [1945] 2 D.L.R. 65. [5] See Restatement of Torts, §§ 379 et seq.

analogous set of facts occurring exclusively in England, no liability exists under English law, the defendant is not liable, irrespective of any rule to the contrary prevailing in the domestic law of the place of the accident. If, on the other hand, English law predicates liability upon an analogous set of facts occurring in England, the defendant is liable. At this stage the law of the place of wrong will then be consulted, to see whether or not, at that place, the defendant's conduct was "justifiable." If so, English law grants him a valid defense.[6] The term "justifiable" means more than "not subjecting the defendant to liability for damages." The defendant's conduct is not justifiable when it constitutes an offense punishable at the place of wrong. In *Machado* v. *Fontes*[7] an action was brought in England for conduct carried on in Brazil. Under English law such conduct subjected the defendant to liability for slander. Under Brazilian law the defendant was not civilly liable, but subject to punishment. His conduct was held not to be justifiable in Brazil, and the defendant was held liable.

In the present case the situation was complicated by the fact that the defendant had been acquitted of the offense of negligent driving by a criminal court of Ontario. The Quebec courts held that this decision was not binding upon them, and that they were free to find that the defendant had violated the criminal law of Ontario. An American court would probably have regarded as conclusive the decision reached by the criminal court of the place of the accident. If that court would have been one of a sister-state, the result would almost certainly have been regarded as being required by the full faith and credit clause of the Constitution of the United States;[8] if the criminal court would have been that of a foreign country, its decision, although not regarded as binding under the Constitution, would most likely have been held conclusive nevertheless, as having been rendered by a court of competent jurisdiction.

The attitude of the English courts, which is generally applied by the courts throughout the British Commonewealth of Nations, has been criticized frequently and severely.[9] To anyone regarding as axiomatic the territorial theory of conflict of laws, the rule subjecting all cases of tort to the law of the place of

[6] Phillips v. Eyre, 6 Q.B. 1, at 28–29 (1870), per Willes, J.: "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; . . . . Secondly, the act must not have been justifiable by the law of the place where it was done."

[7] [1897] 2 Q.R. 231.

[8] Art. IV, § 1; the question of whether or not such conformity would really be required by the full faith and credit clause is not beyond doubt, however.

[9] See, esp. Goodrich, Conflict of Laws 221 (2d ed., 1938); Cheshire, Private International Law 303–5 (2d ed., 1938); Keith, The American Law Institute's Restatement of the Conflict of Laws, 1 U. of Toronto L. J. 233, 257 (1936); Hancock, A Problem in Damages for Tort in the Conflict of Laws, 22 Can. B. Rev. 843, 853 (1944). The rule is defended by Falconbridge, Annotation, [1945] 2 D.L.R. 82; see also the same author's note in 17 Can. B. Rev. 546, 549 (1939), and book review by Lorenzen in 52 Yale L. J. 680 (1943).

wrong appears as self-evident and the British rule as an unjustifiable heresy. Strangely enough, however, these criticisms have not been extended to divorce cases where it is regarded as equally axiomatic in both British and American courts that no law other than that of the forum will be consulted in determining the existence or nonexistence of a ground for divorce, irrespective of whether or not the conduct alleged to constitute such cause is so regarded at the place where it was carried on.[10] An inquiry into the motives impelling a court ever to decide a problem under any law other than that of its own jurisdiction reveals either blind belief in dogmas of allegedly logical conclusiveness, which do not stand up, however, under logical scrutiny,[11] or, as a motive of intelligible policy, the desire to protect the justified expectations of private parties or, in certain rare cases, to help a friendly foreign state in the enforcement of its policies. In tort cases these considerations do not require that attention be paid to any law other than that of the forum, beyond the elementary idea that nobody should be compelled to pay damages for the result of conduct which, at the time it was carried on, the actor was justified in regarding as innocent and permissible. This result can well be achieved under the British rule, which has the additional merit that under it the task of the courts is easier than under the American rule, which compels the courts to make lengthy and cumbersome inquiries into foreign law even where they are in no way required by justice. To make things worse, even definite injustice can result from the American rule, when "place of wrong" is understood as the place where the effects of allegedly tortious conduct have taken place, rather than as the place where the conduct itself has been carried on. The identification of the place of wrong with the place of the harm has been stated as American law in several pronouncements of high authority.[12] An effort to show that this identification has been produced by historical accident, rather than through considerations of deliberate policy, and that its mechanical application results in unjust decisions, i.e., decisions defeating the very policies for whose sake the whole field of conflict of laws has been invented, has been made in a recent publication.[13] While it is probably too late to hope that American courts will adopt the easy, practicable, and just approach of the British courts, they can still be expected to modify the mechanical application of the place-of-harm rule.

M. Rh.

[10] This rule is accepted without criticism even by so vigorous a proponent of the vested rights-territoriality theory as the late J. H. Beale; see his Treatise on the Conflict of Laws § 135(1).

[11] See esp. Cook, The Logical and Legal Bases of the Conflict of Laws (1943).

[12] Restatement of Conflict of Laws § 378; Beale, Treatise 378; Goodrich, Conflict of Laws § 90.

[13] Rheinstein, The Place of Wrong, 19 Tul. L. R. 4, 165 (1944).

BOOK REVIEWS

Safeguarding Civil Liberty Today. The Edward L. Bernays Lectures of 1944 given at Cornell University by Carl L. Becker, Max Lerner, James Lawrence Fly, Robert E. Cushman, Francis Biddle, and an address by Edmund Ezra Day. Ithaca, New York: Cornell University Press, 1945. Pp. 158. $2.00.

The Best Is Yet. By Morris L. Ernst. New York: Harper & Bros., 1945. Pp. 291. $3.00.

Perhaps, to borrow a suggestion from Professor Cushman in one of these essays, the appearance of the *Chicago Tribune* each morning is sufficient evidence to those in Chicago at least that civil liberties are still alive and the press is still free. But in any case it is good to have these two books giving attention to so vital a matter, particularly as they are published just as America is emerging from a great war.

Collections of this sort are never easy to review. The Bernays lectures are not systematically related and do not attempt systematically to cover the civil liberty field. Mr. Ernst's book is a collection, too; a series of rather random observations, only part of which touch on the matter at hand. However, both books throw considerable light on various aspects of the problem, and, like all books about freedom, should have a particular relevance for members of the bar.

The central essay I found to be that by Professor Cushman under the title, "Civil Liberty and Public Opinion." As the title suggests, Professor Cushman finds civil liberty and public opinion "the two foundation stones upon which constitutional democracy rests." From their interdependence he builds four basic propositions, and the balance of his discussion as well as that of the other lecturers and of Mr. Ernst may be taken as amplifications of these points. They are: (1) public opinion can exist only where civil liberty is kept alive; (2) civil liberty can exist only when supported by public opinion; (3) today public opinion with respect to civil liberty shows dangerous evidence of inertia, confusion, and complacency; and (4) courageous and active leadership is necessary if we are to continue to have a public opinion which properly values civil liberty.

Thus, the late Professor Becker's essay, "Political Freedom: American Style," although primarily a plea for a realisitic re-evaluation of the efficiency of our 150-year-old constitutional framework of checks and balances, serves to trace historically why the emphasis on civil liberty and public opinion has been peculiarly "American style." Professor Becker also underscores Professor Cushman's second and third points by stating repeatedly that we must not rely on the fact that our civil liberties are neatly catalogued in our state and federal constitutions. Simply as a matter of style, it is the two professors who carry the field against the other perhaps more practically engaged gentlemen; the polished prose and easy wit of Professors Cushman and Becker are a special delight.

In the same way, Mr. Lerner's entire paper, "Freedom: Image and Reality," may be taken as illustrative of Professor Cushman's third point that public opinion with respect to civil liberty today is at a dangerously low ebb. Our desire for liberty, says Mr.

Lerner, may be as great as ever but our commitment to it has seriously lessened. And in support he makes a rapid but vigorous survey of America at war, the "surveillance state," the spread of mass terrorism against racial minorities, and particularly the restricting and fearful attitudes toward our basic economic issues—labor relations, full employment, international trade.

Or again, Professor Cushman cites the failure of the courts to protect the Negro as proof for his second point that there can be no true civil liberty, regardless of the letter of the law, unless there is sufficient public opinion to implement it; and Mr. Biddle's paper serves as a full and illuminating exposition of this example as he traces in detail the fate of the Civil War civil rights acts at the hands of the courts. There is a nice historical parallel here: Professor Becker says the distribution of economic goods is the crisis of today, as the Negro question was the crisis of the Civil War period, and Mr. Biddle tells us that the civil rights statutes, originally passed to protect the Negro, are today used in part to protect the collective bargaining rights under the National Labor Relations Act. Mr. Biddle's paper also provides a valuable and generally encouraging summary of the work of the Civil Rights Section of the Department of Justice which, thanks to the Supreme Court, must work in as intricate and artificial a pattern of precedent as ever plagued a corporation lawyer.

Mr. Fly writes of the basic regulations of the Federal Communications Commission to insure that public opinion as formed through the medium of radio will be formed within a decent framework of civil liberty. It is Mr. Ernst who furnishes the most telling evidence of just what Mr. Fly and the Commission have been up against in getting public opinion favorable to their work. Mr. Ernst relates that he met Congressman Magnuson at a party soon after a speech by Congressman Miller of Missouri attacking Fly and the FCC had been given front-page coverage in the *New York Times*. Why, chided Mr. Ernst, didn't he reply? Wherewith Magnuson explained that he had known of Miller's speech and had prepared and delivered a careful reply, which he summarized for Ernst, immediately after, but not a word of it had been reported in the *Times*. You'd have thought, he mused, they would have at least appended a footnote: "Magnuson also spoke."

Finally, President Day's brief paper, "Freedom To Learn," and those portions of Mr. Ernst's book dealing with his distinguished practice in the civil liberty field may be taken as further comment on Professor Cushman's fourth point that there must be vigorous leadership, especially from the university and the bar.

So much then for the over-all framework of the discussion. Several points invite further comment.

Since the essays were written toward the close of a great war, it might be expected that the effect of the war on civil liberty would be the main theme. This, however, is not the case. In fact, I doubt if the discussions read much differently from those of a decade earlier. The reason, of course, is a happy one; contrary to widespread prediction we did not become a dictatorship in order to fight one, and the impact of the war on liberty was not radical either here or in England. Mr. Lerner, Mr. Ernst, and Professor Cushman all pause to note that the government's record is vastly superior to that in World War I. This is due in part, as Mr. Lerner suggests, to the comparative absence of any strong minorities opposing the war, such as harassed Wilson, but in part is evidence of democratic strength. The only glaring exception has been the shocking treat-

ment of Japanese-American citizens on the West Coast, which Mr. Lerner and Mr. Ernst note briefly.

The great wartime contribution to liberty was made rather by our enemies who proved for all time and almost beyond belief the degree to which control of public opinion can be manipulated, once civil liberties are suppressed.

Our wartime experiences, particularly with reference to wartime security measures, remind us once again that there are limits even to our greatest freedoms and that there is a measure of relativity to civil liberty. There is an exciting extension of this consideration at the beginning of Professor Becker's paper. He states that the Russians, for example, regard our highly prized liberties as rather poor, negative things and regard themselves as freer since their government provides the basic freedoms of job, education, place to live, medical care, etc., while ours merely leaves us alone. "One man's freedom," Professor Becker quips, "may be another man's bondage." Mr. Ernst adds the useful observation that although free speech is in an unsatisfactory state in Russia, she has done a notable job on removing race prejudice. This is not the place to deal with so fundamental a matter, other than to suggest that comparative law work in the civil liberties field sounds as though it might be very fruitful. Surely, a companion volume on civil liberty in Russia would be most welcome. Perhaps the restriction of civil liberty in institutions for which we have respect, such as Russia, the Catholic Church, and the U.S. Army, should invite our special attention and study.

Speculation about civil liberty in Russia raises another query which gives some signs of becoming the central issue of the day: namely, to what degree are civil liberties related to and dependent upon the economic form of the society? At the moment an opponent of economic planning, such as Professor Hayek, calls his book *The Road to Serfdom*, while the editors of the *New Republic* reply to his title by calling a symposium on full employment "The Road to Freedom." Professor Becker and Mr. Lerner both touch on this matter, but briefly.

Mr. Ernst and Professor Becker also furnish fodder for another query. May in some respects our liberties today be too broad? For Mr. Ernst the problem arises in connection with the activities of the American Communists who are his pet bugaboo and who have joined and plagued every liberal venture of his from the Scottsboro trial to the Lawyers' Guild. Says Mr. Ernst: "We still must find the technique for handling secret, underground, undemocratic minority controls of democratic organizations." For Professor Becker the matter arises in a variety of details of modern life:

> Freedom of speech is an invaluable right and must be preserved, but does it necessarily include the right to publish scandal sheets and exploit the misfortunes of families, to employ fruity-throated radio announcers to misinform some of the people all of the time about the merits of commodities made and sold for private profit? . . . . The right of persons charged with crime to a speedy and fair trial is an invaluable right, but is trial by jury as now conducted, which proceeds on the assumption that if two sets of skilled lawyers distort the facts in opposite directions the truth will emerge, the best method of securing the right?

One last point on the theoretical level. Professor Cushman bases the value of civil liberty on political values only. The function of civil liberty is to make possible the free formation of public opinion which in turn is the motive power of democracy. Or as President Day says: " . . . . the basic considerations [behind free speech and press] have to do with the obvious requirement of intelligence in the electorate." Or again Mr. Fly, for the point is a popular one, states the significant purpose is "the diffusion to the

public of the ideas and the information necessary for intelligent self-government." We have only a half quarrel with this emphasis. It is always useful to remember the vital connection between civil liberty and democracy but it appears unnecessary and a little jingoistic to confine its value to the political field alone. After all, one of Mr. Ernst's most celebrated cases involved the importation of Joyce's *Ulysses*. And Mr. Fly might have noted that Milton, whom he quotes, wrote his great defense of freedom back in the days when there was not so much talk of democracy. What concerned Milton was not that without free speech and thought the electorate would be unable to form intelligent political opinions, but that men would be unable to form intelligent opinions, and that there would be a net loss of the truth possessed by mankind. That is still not a bad rationale.

There is much other material in the two books worth comment. The influence of Martin Dies, which Professor Cushman has treated eloquently; the influence of the FBI, which worries Mr. Lerner, although Mr. Ernst has some very nice things indeed to say about J. Edgar Hoover; the pressures on universities not to do anything that would tend to strain public relations, which President Day discusses and which might have prevented the Bernays lecture series itself; the fact that our chief intolerance today seems to center on economic issues; the association of civil liberties with the lunatic fringe and the widespread feeling that too active an interest in civil liberty makes one a little suspect somehow, as both Professor Cushman and Mr. Ernst note; and always, our failures to resolve the Negro problem.

But by way of concluding we should like to touch on one other characteristic of modern America, what Mr. Ernst and Mr. Fly call "the concentration of control of the pipelines of communication" into startlingly few hands. It is not the force of government impinging on civil liberty which we need so much watch today, Mr. Fly states, as it is other forces within the society. Mr. Ernst puts the problem well:

> I've spent a good portion of my life defending books and movies and radio and unpopular left-wing movements from governmental restraints. But I'm convinced that the impact of state controls—postal, movie, censorship, sedition laws, obscenity statutes, police ordinances—all together exclude from the market place of thought only a negligible number of ideas. Much more material is banned through consolidation into a very few hands of the controls over communication—movies, radio, and the press. Our faith in freedom of speech is predicated on only one theorem. We hold that in the clash of ideas truth will rise to the top in the market place. But there must be a market, as wide as possible and free. . . . .

And again: "About thirty men realistically dominate the conduits of thought through the ether, the printing press and the silver screen. . . . . The cartelization of the mind of America is well on the way." The statistics are compelling: the five movie majors own their own theatres and collect 70 per cent of the box-office money of the nation; since 1900 while the population has increased from 76 to 135 million the number of daily newspapers has declined from 2,350 to 1,850, and many of these are absorbed in the national chains; in 120 cities the only paper owns the only radio station, and so on. In the case of radio there is some chance for a frontal attack on the problem through the FCC, and Mr. Fly's summary indicates that several effective steps have been taken. But with reference to the movies and press any direct solution is difficult to see. Application of the antitrust laws will help and Mr. Ernst suggests certain minor controls —graduated postage subsidies, incentive taxes, etc. But as both he and Mr. Fly em-

phasize, it is necessary that means of communication be charged with public interest to a degree far greater than as yet realized in our law.

All the papers in varying degrees hit the corollary problem. If it is imperative that a free market place be available, it is also imperative that it be used. It is here that the university and the bar have their traditional and special responsibility. The men who have the truth and who have the ability to present it are perhaps charged with a public interest, too. Collections of this sort suggest that university courses, particularly in law school, might well be more sharply devoted to the civil liberty field as a subject.

Since much of Mr. Ernst's book is not related to civil liberty, it deserves brief separate mention. Mr. Ernst has written, as he intended, a casual, informal series of short notes on anything and everything that has interested, aroused, or irked him in the course of a busy life. He writes as a man who has neither wasted nor forgotten a moment in the last thirty years. Mr. Ernst tells a story about George Bernard Shaw which has its relevance to Mr. Ernst's book. Shaw explained that he had no moral objections to liquor but that he didn't drink because when sober he could reject 90 per cent of his ideas before he got them on paper.

Although Mr. Ernst's book is too loosely and hastily compiled to be a good book, it is frequently good reading. Further, its very informality gives it value as an ingenuous reflection of Mr. Ernst's personality. Since Mr. Ernst is a distinguished lawyer the book is a useful and revealing addition to the sparse literature on what makes a successful lawyer tick. Mr. Ernst has been so natural about it all that he has even included some letters he once wrote to a baby and a short story of his, which, as he says, he has never been able to get into print before. The dust jacket says that Thurber does not like the title and has started a game of suggesting a new one. We have a suggestion: "The Importance of Being Ernst."

Edna Ferber, one of his closest friends, says on the cover that Mr. Ernst is a "cerebral" man. The adjective is a peculiar one, but it is remarkably apt. Mr. Ernst is literally full of ideas. I did not completely catalogue them, although to borrow one of Mr. Ernst's favorite phrases, it would be fun to do so, but I should guess there are at least two hundred theories between the pages of this book. And they are theories of the utmost diversity, from the technique of blowing one's nose to an Anglo-American commodity budget. Everything is grist for Mr. Ernst's mill, from the sight of paper toilet seat covers to the tranquil delights of sailing.

Perhaps the best notion of the flavor of the book can be gained from a rapid survey of Mr. Ernst's enthusiasms and peeves, although again the lists are not exhaustive. Some enthusiasms: Franklin Delano Roosevelt, of whom he writes very well, Brandeis, Nantucket, law, England, nature lore, sailing, Madison Square Garden, carpentry, world almanacs, Heywood Broun, keels, Dorothy Thompson, David Dubinsky, E. B. White, and the *New Yorker*, Ethel Waters, bowling, taxi drivers, Henry Wallace, people with mechanical aptitudes, Lloyds, Margaret Sanger, J. P. Morgan and Co., Jerome Frank, J. Edgar Hoover, Ted Husing. Some peeves: size, railway express, advertising, chrome on iceboxes, sailboat racing, nurr, Marcantonio, American Bar Association, Chase National Bank, Zionism, the current Lawyers' Guild, the glacial theory, doctors, Henry Luce, the way paper was rationed in the United States, Commissioner Paul Moss, drama critics, Tom Dewey, the rhythm method of birth control, Arthur Krock, theories as to the speed of light, and—above all—Earl Browder.

One major quality of Mr. Ernst will be apparent from the above lists. He is a liberal in the old-fashioned and valuable sense. He really does know and like people on both sides of the fence, and today it is particularly useful to have men who have enthusiasm for both David Dubinsky and the Morgan partners.

Whatever its defects of style and organization, Mr. Ernst's book is always warm, frequently charming, and sometimes incisive. From a full and rich practice he has much to say about law, not only in the civil liberties field, but in taxation, labor relations, ethics, criminology, and divorce as well. However, for the young law student and lawyer his book has a particular relevance. The law, says Mr. Ernst, is the "most exciting of professions." And his book does much to show why he finds it so. It is good indeed to have someone say that again and say it vigorously. We wish Mr. Ernst well and we trust that his title will prove truly prophetic.

HARRY KALVEN, JR.*

Taxable Income, Revised edition. By Roswell Magill. New York: Ronald Press, 1945. Pp. viii, 491. $6.00.

Half a century ago a leading figure in American advocacy, Joseph H. Choate, sounded the tocsin in the Supreme Court of the United States: an income tax is communistic. His immediate purpose at that time was to have the 1894 act of Congress imposing an income tax declared unconstitutional. He succeeded,[1] but little did he and his generation foresee that within two decades Congressional authority to impose taxes on income—communistic[2] or no—would be formally imbedded in the organic law of the land.[3] Now, thirty years thereafter, millions take for granted the fiscal necessity of taxes on income.

Since the adoption of the Sixteenth Amendment there have been nearly twenty-five complete revenue acts, each one adding either some new concept or statutory modification of what is to serve as the base for the imposition of a tax on income. This kaleidoscopic movement in statutory patterns and the liberality of inducement to litigate[4] have combined to produce a plethora of court decisions and administrative pronouncements that is equalled nowhere else in the world. The time has long passed when any "tax expert" could truthfully say he was abreast of all that was going on in income taxation, if by that is meant a close daily acquaintance with all that is pouring forth from legislative, judicial, and executive halls.

Tax practitioners are fortunate in the celerity and competence with which the several standard tax services have for years been making available the latest developments in all fields of taxation. They have also been fortunate in the scholastic excel-

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[1] Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895).

[2] Actually, Mr. Choate said, "The Act of Congress which we are impugning before you is communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic—what shall I call them—populistic as ever have been addressed to any political assembly in the world." Ibid., at 532.

[3] United States Constitution, Sixteenth Amendment.

[4] The bon mot of Thurman Arnold that "taxation without litigation is tyranny" has become well known.

lence exhibited in the well-known textbooks, treatises, and countless law review articles on various phases and aspects of income taxation. Surprisingly, however, during these past thirty years, only one book has appeared devoted to an analysis of the generic concept of taxable income—and that one is the volume here under review. If for no reason other than its thus-far exclusive position in income tax literature, Mr. Magill's work deserves the plaudits of all persons interested in the subject.

Taxable Income was met with generous approval on its original publication in 1936. The present edition, its second, retains all that was discussed before and adds about fifty pages of new textual material discussing the leading Supreme Court decisions rendered since 1936. If the revisions in this edition are so limited, why then, one may properly ask, is a further review justified now? The answer to that inquiry is not difficult.

Ten years ago the primary lesson taught by Mr. Magill in his *Taxable Income* was that income, for tax purposes, is not a fixed, rigid, unalterable, or even wholly logical concept. Whereas many of its aspects are arbitrary, others are altered under the impact of changing legislative and judicial climate. The secondary lesson was that "the dangers of a delusive exactness"[5] are as present in a frozen concept of taxable income as they have been shown to be elsewhere. Today these lessons retain their full vitality, and it is to Mr. Magill's credit that he has had to make so few basic changes in the revised edition, other than those necessary by virtue of the lapse of time.

This book does not advocate any so-called "tax philosophy," and thus is not a controversial document in any political sense. The author has successfully confined himself to analysis and objective explanation. For Mr. Magill's notions and ideas about what constitutes sound income taxation one must search elsewhere, e.g., in his study, *The Impact of Federal Taxes*,[6] his numerous addresses before business and professional groups, and *A Tax Program for a Solvent America*.[7]

A study of the requirement of the realization of income constitutes the opening and largest portion of the book. Realization of income is an orthodox and apparently firmly established requirement but "realization" is not an inelastic concept. *Eisner* v. *Macomber*,[8] probably the most cited decision in all federal taxation literature, is the keystone of that concept. Were that decision to be overruled a substantial part of what appears between pages 3 and 219 of Mr. Magill's book would have to be rewritten. Close students of taxation appreciate that in *Helvering* v. *Griffiths*,[9] decided since the appearance of the original edition, a frontal attack by the Treasury on *Eisner* v. *Macomber* failed by much less a margin than is apparent to the eye. In rejecting the Treasury's position in the *Griffiths* case, the Supreme Court made Mr. Magill's task of revision so much simpler! Some day federal income taxation may approximate the economists' definition of income as net accretion to net worth more closely than it does now; therefore, a later edition of *Taxable Income* may require more changes than did the second.

The other traditional divisions of the book—known as the Magillian categories—relate to characteristics of income and source of payment. He analyzes many debatable

[5] Truax v. Corrigan, 257 U.S. 312 (1921), Holmes, J., dissenting at 342.

[6] Magill, The Impact of Federal Taxes (1943).

[7] Committee on Postwar Tax Policy (1945), Mr. Magill, chairman.

[8] 252 U.S. 189 (1920). [9] 318 U.S. 371 (1943).

topics in these sections. For example, there is his discussion of whether the Sixteenth Amendment would permit the taxation of gross income and of gifts and bequests as income. He points out with perspicacity that in taxation problems, as in so many other instances, the Supreme Court often does not venture ahead in enunciating its governing principles but awaits a clear legislative direction.[10] Thus, one cannot confidently say that gross income could not be made the basis of taxation, or that gifts and bequests could not validly be included in taxable income—were Congress to state so unequivocally. And who is to guarantee that some day Congress may not so direct?

Mr. Magill does not appear to be surprised by the decisions on trusts and assignments which have been handed down since 1936. And there is little reason why he should be, for the roots of those decisions are found in the decisions of the twenties and thirties. They illustrate the point that the older federal income taxation becomes, the more expansive becomes the scope of taxable income.

One observation remains to be made. The pattern of the book closely resembles, if it does not follow, that of his casebook.[11] There has been some criticism of the teachability of that arrangement in the casebook;[12] and this reviewer is inclined to agree with that criticism as to the logicality of the sequence of the three major divisions of this book. It is somewhat disconcerting to be "plumped" at the outset into involved discussions about distributions by corporations, reorganizations, and sales and exchanges. It seems to this reviewer that these could be more easily understood if the reader were to be first led into an analysis of what constitutes income and then guided into discussions of realization and liability for tax.

Taxable Income merits the serious attention and study of all those interested in taxation either as a matter of livelihood or academic understanding. It was designed as a distillation, rather than a compilation, of the thousands of tax decisions; and as such it is a genuine help to either the self-satisfied expert or the nervous beginner. Multiplicity of decisions give the appearance of endless confusion and hopeless uncertainty, but on closer study one discovers that the author has shown patterns and trends. For an intelligent understanding of income taxation there is not only required a thorough knowledge of the technical aspects of those decisions but also an appreciation of overriding patterns and discernible trends. Mr. Magill's work gives the reader that essential.

A word about the author's qualifications. Mr. Magill has been a professor of law and active practitioner at the bar for twenty-five years. Not to be overlooked is his high official affiliation with the Treasury Department on three separate occasions: 1924, 1934, and 1937 when he was Under Secretary. This rich and varied experience comes in good stead for a well-rounded and balanced analysis of such an elusive concept as taxable income. It negatives any ivory tower or armchair ratiocinations on as practical a subject as taxation.

LEO A. DIAMOND*

[10] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Holmes, J., dissenting in Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917).

[11] Maguire and Magill, Cases on the Law of Taxation (1940).

[12] Bowden, Review of Maguire and Magill, Cases on the Law of Taxation, 8 Univ. Chi. L. Rev. 192 (1940).

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Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664–1776). By Julius Goebel, Jr. and T. Raymond Naughton. New York: The Commonwealth Fund, 1944. Pp. xxxix, 867. $5.00.

Since the constitution of the State of New York provides that the acts of the provincial legislature and such parts of the common law and statutes of England as together formed the law of the colony on April 19, 1775, should be the law of the new State, the authors of this work commend it to New York judges, lawyers, and legislators as having more than an antiquarian interest. They even venture to hope that it may help to preserve the hard-won but currently threatened rights of the citizen by keeping clear

> their meaning as the distillation of past happening . . . . . Only thus can there be intelligent choice when the moment comes to decide whether there is more virtue in losing touch with the past than in harkening to its lessons. The alien corn which seems so ravishing to many of our own generation may be more green than the fields so long and so toilfully ploughed, but there have been good harvests here and the tale of the reapings may move men to cherish the old seed.

In his Introduction to the joint study Professor Goebel takes vigorous exception to the findings of two groups of students of Colonial law. His most specific criticisms are directed against those jurists (and notably Roscoe Pound) who speak of the "crudities" of American judicial organization and procedure as legacies of frontier conditions, and who insist that the history of the common law in America really begins after the Revolution. The authors confine their study of law in the New World to Colonial New York, and in refraining from comment on the other colonies they protest against "dangerous generalizations," ill-informed attempts to "produce a never existent common American rule," and the ignoring of changes produced in the course of a century or more.

So far as New York is concerned, while it is freely admitted that English law acquired a New World identity, it is denied that Colonial law was the product of frontier ignoramuses. It is indeed admitted that in 1681 defendants were ignorant of many technicalities and "judges were not much more sophisticated," but the authors conjecture that "if we possessed accounts of country trials in contemporary England the proceedings would not seem very different." But the authors assert—and their heavily documented study bears them out—that by 1702 at least "the colonials were almost as knowledgeable as the men at home" as to the niceties of procedure.

> This is far from any claim that provincial law was identical in all its ramifications with English law. New York possessed a much simpler and more rational judicial organization than did England, and whatever rules and practices were received had to be accommodated to this system. The colonists remade the justice of the peace into a judge of civil as well as of criminal causes, they jettisoned outlawry and escheat and, in . . . . various ways . . . . effected minor accommodations. These achievements were recognized to be something discrete and substantial, inferior, if at all, only to the fundamental law from which they were derived, because this fundamental law was conceived as something right, above and beyond the pronouncements of official persons. That is why, immediately after independence had been declared, the provincial Congress could speak of the laws of the state as if the renunciation of the sovereign had been no more than the removal of a symbol—the law stood.

In addition to legal historiographers who are not scholarly enough, those historians and other laymen are rebuked who venture into the field of law with inadequate technical knowledge. The authors do not specifically say so, but one gathers that little of any real value on the early history of American law had been written before their

studies, though Herbert Osgood is praised for recognizing his own limitations. Be that as it may, serious students will welcome this exhaustive and scholarly study and hope that equally competent studies will be made of law and procedure in the other Colonial jurisdictions.

The authors have consulted all the surviving manuscript legal records and documents as well as the Colonial statutes. The records are regrettably fragmentary, and even when undamaged they are often exasperating in what they omit. Nevertheless the main features are reasonably clear. The study is a detailed and often highly technical one covering jurisdiction, appeals, error and review, prosecution, process, recognizances, trial, and final proceedings. The authors take pains to present parallel and relevant English material.

They recognize that law and procedure cannot be completely understood apart from their institutional, social, and intellectual setting, and they occasionally suggest such relationships, e.g., in connecting summary trial with the problem of vagabondage and local costs of detention and relief or in conjecturing that the low scale of provincial fines might be related to a desire to prevent appeals to the Crown in criminal cases.

General historians will note the authors' conclusions as to the "reception" of the English law in the colony and their denial of its "frontier" character. The culture historians "who function in a pleasant anarchic world of their own" may be grateful for a certain amount of human interest material quoted from the records.

ARTHUR P. SCOTT*

Municipalities and the Law in Action, 1945 Edition. Edited by Charles S. Rhyne. Washington: National Institute of Municipal Law Officers, 1945. Pp. 500. $10.00.

This volume consists mainly of reports by city attorneys on current problems of cities. Municipal attorneys as staff officers of local governments are concerned with all types of municipal problems, as is indicated in the subject matter of the twenty reports prepared by committees of attorneys covering such problems as federal-city relations, public housing, taxation and revenues, municipal bonds, public utilities, model ordinances, municipal tort liability, airport legal problems, planning and zoning, protection of civil liberties, status of city-state relations, effect of the war on city contracts, technique of opinion writing, traffic-court reform, and intermunicipal agreements. These reports were presented in printed or mimeograph form at the 1944 annual conference of the National Institute of Municipal Law Officers. At the conference the chairman of the committees summarized the highlights of their reports, which were then discussed from the floor. Approximately one-fifth of the present volume is devoted to a summary of the discussion.

A few of the reports consist of only perfunctory remarks while others convey a broad picture of particular legal problems with comment on the economic and historical background of court decisions. These latter reports provide the city attorney with supplementary material as an aid in the interpretation of current court and federal administrative decisions. The value of the book lies chiefly in the analysis of some recent decisions, opinions of the city attorneys, and a record of the legal experience of some of the larger cities. Now in its eighth year of publication it is an excellent reference

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book for use not only by the 2,000 city attorneys and their assistants employed by the law departments of 400 cities who are members of the Institute, but also by other municipal officials and by members of the legal profession who are concerned with municipal problems.

It is only natural that municipal attorneys should emphasize the legal point of view. This attitude is carried to an extreme, however, on the question of collective bargaining in public employment, with the attorneys relying mainly on their own opinions. The committee report covering this subject tends to show that political subdivisions may not enter into bargaining agreements without specific statutory authority. The fact is that there are many existing agreements between cities and labor unions which have been made without enabling legislation. Municipal officials, in view of what is happening in private industry, cannot shut their eyes to existing conditions. The tangled problem of labor contracts in public employment cannot be disposed of categorically on the basis of law and doctrine. There is a large field of administrative discretion in the handling of employment problems, and municipal administrators who are directly concerned with the management of men to get municipal work done are inclined to take a practical and realistic view in handling the cities' labor problems.

The city attorney is one of the most important officers in local government, and top management constantly looks to the law department for advice, although management (the chief administrator and the city council) is not bound to follow such advice. But this does not detract from the value of this excellent compilation of municipal experience on current problems. In the National Institute of Municipal Law Officers the city attorneys of the country have set up a splendid clearinghouse of information on the experience of cities in handling the legal aspects of municipal problems. The present volume and the numerous special reports issued by the Institute are of great value to city managers, city clerks, and other local officials in improving the administration of municipal services.

ORIN F. NOLTING*

Can Representative Government Do the Job? By Thomas K. Finletter. New York: Reynal & Hitchcock, 1945. Pp. 184. $2.00.

Has the friction between President and Congress become a continual and growing menace to the proper functioning of the federal government? Has the structure of the federal government become inadequate for our present needs, both domestic and foreign? These are questions that have arisen with considerable frequency in the past few years. Professors W. Y. Elliott and William Macdonald have each considered these problems in excellent works, and more recently Mr. Henry Hazlitt has given us an excellent book on proposals for reform.[1] The editors of *Fortune* have considered the problem in the issue of November, 1943. Proposals have been made from time to time, varying from the introduction of the parliamentary system to moderate changes in Congressional organization and procedure. Now comes the contribution of Thomas K. Finletter to the discussion in *Can Representative Government Do the Job?* Mr. Finletter's

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[1] Hazlitt, A New Constitution Now (1942); Elliott, The Need for Constitutional Reform (1935); Macdonald, A New Constitution for a New America (1921).

suggestions fall midway between the radical and the conservative proposals. He has excellent chapters on the difficulties which even the strongest Presidents have had in dealing with their Congresses. Toward the middle of every presidential term, constructive reforms and policies are torn apart, the public is confused, and the operation of government is reduced to a stalemate or a free-for-all. In other words, rubber-stamp Congresses do not exist. This does not mean that Mr. Finletter believes that either the presidential office or Congress should be abolished. He believes neither in the absolutism of an unchecked President nor in the anarchy of multi-headed government. He seeks cooperation between President and Congress for the grave problems that face the government today and will face it in the future.

To attain this cooperation he suggests:

(1) A reduction of the number of committees of both House and Senate, with the abolition of the seniority rule in the Senate. The number of major committees would be reduced to about nine.

(2) The committees would be joint committees of House and Senate.

(3) The chairmen of these committees, being of the majority party, would act with members of the Cabinet as an executive-legislative council for the purpose of furthering administration policies and framing major legislation.

(4) The heads of executive departments and various executive agencies could appear on the floor of either house for questioning and defense of their policies.

(5) The terms of members of Congress and of the President would be extended to six years.

(6) Any time within that period when deadlock developed between the President and the executive-legislative council, or between the council and Congress, the President could dissolve Congress. In such a case both the President and the members of Congress would go before the people in a new election for new terms of six years.

Through this last proposal he believes that national parties would be strengthened, inasmuch as they would have to be prepared for an election at any time. This would result, he believes, in greater party discipline and responsibility in Congress and less emphasis on local issues throughout the country in national elections. Yet he would not expect frequent elections by dissolution: only the threat would be there at all times.

With the exception of the provision for the dissolution of Congress and the six-year terms for the President and the House, the plan could be carried through by executive order and action of Congress. An amendment of the Constitution would be required to bring about the dissolution and six-year-term provisions. These suggestions form an interesting combination of the parliamentary and presidential systems. Mr. Finletter believes that the parliamentary system as practiced in Britain would be too great a wrench from American tradition for the people of this country. His views are given with clarity of style and of reasoning. They undoubtedly do a great deal to convince the reader.

It is no argument against his plan to point out the difficulties of amending the Constitution for the purpose he has in mind. He is aware of the difficulties. The need for immediate reform is as strong as he asserts. The telling argument of this book should be repeatedly studied by every intelligent citizen in the land.

JEROME G. KERWIN*

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Methodology of the Social Sciences. By Felix Kaufmann. New York and London: Oxford University Press, 1944. Pp. viii, 272. $3.50.

Social scientists, including the lawyers, have not failed to notice the radical transformation which has occurred in the theory of logic since the pioneer labors of Peacock, Gregory, and Boole in the first half of the nineteenth century. Nor have they overlooked the success achieved by modern logic in the changes which it has brought about in the mathematical field. Although there is ground for belief that the application of the new logic to other domains of thought will yield a harvest as fruitful as that reaped in the mathematical, the results so far have been disappointing. The greatest advances have been in the understanding of the nature of scientific investigation, particularly in the direction of the requirements of generality. Thus, modern logicians regard it as a waste of time to concern themselves with inferences that involve particular cases. For the proposition "Socrates was a man, all men are mortal, therefore Socrates was mortal," they substitute the proposition "If anything has a certain property, and whatever has this property has a certain other property, then the thing in question has the other property." It is this kind of absolute generality that modern logic seeks, and it leaves to other sciences the task of discovering whether propositions of the Socratic type are true or false. But the conclusions of the new logic with respect to propositions of even the generalized type are far from settled. Only a few years ago the generalized proposition just quoted was held by the most advanced logicians to be quite self-evident. It is now taken to be a "stipulation," a condition to be fulfilled if the necessary demands of scientific inquiry are to be met, comparable to the observance of certain forms on entering into a contract.

Professor Kaufmann's volume is an effort, from the point of view of modern logic and other sources of knowledge, to place the methodology of the social sciences on a more solid foundation than it enjoys at present. At the outset he makes the assumption that there are certain invariable fundamental properties common to all the sciences. This does not mean in his system that a sound methodology would be applicable to all the sciences, equally, or even always applicable to one science. Thus, in Wölfflin's theory, the Gothic architect was faced with specific architectural problems, such as the wishes of the patron and the availability of materials, and his solution of them under those particular conditions gave to Gothic architecture its specific character. In Burckhardt's theory, Gothic architecture was a creation of Gothic man, and in order to understand it Gothic man must first be understood. Professor Kaufmann recognizes that both approaches are valuable for the history of art. His own theory is sufficiently general to allow for the methods of both Wölfflin and Burckhardt.

Professor Kaufmann regards scientific thinking as "a process of classifying and reclassifying propositions by placing them into either of two disjunctive classes in accordance with presupposed rules." He holds this to be the most general characterization of such a method of thought. It means, briefly, that the scientist is concerned with dividing synthetic propositions (i.e., propositions which restrict the "given" frame of possibilities, e.g., "There is blue at place p at time t)" into two disjunctive classes: accepted propositions and non-accepted propositions. But the decision which leads to the transfer of a proposition from one class to the other must not be arbitrary; grounds must be offered to justify it. Professor Kaufmann emphasizes that the term "ground" is ambiguous. In one sense it means that a premise is the ground for the acceptance of a

conclusion. In this meaning the term is assignable to formal logic. But the term is also used in a different sense, as when we assert that some proposition can be accepted because we have already accepted another, even though that proposition cannot be deduced from the other. Professor Kaufmann is interested exclusively in the term "ground" in the second sense, where it has relation to empirical procedure. For mere logical analysis in such cases will not determine whether a particular proposition is ground for another; resort must be had to rules of empirical procedure in order to settle the question. He is interested in empirical grounds and not logical grounds.

At this point Professor Kaufmann rejects the view, which has prevailed since the days of classical Greek science, that science is best defined as a hypothetico-deductive system of propositions. He observes that this definition implies that the set of propositions established by inquiry in a particular domain must form a deductive system. He believes that means that "most of the existing branches of knowledge could no longer be called sciences, and even the few 'sciences' then remaining would lose the title as soon as new experiences led to a 'disturbance' of the system." The first objection involves merely a matter of prestige. It is clear that some sciences are more developed than others, e.g., mathematical physics is further advanced than sociology. It is also clear that in domains where the most rigorous controls are exercised the special science involved may still be in a rudimentary stage of development, e.g., the branch of astronomy devoted to the analysis of variable stars. But one of the ideals of this latter science and of sociology is that of deductive system, and their relatively immature development is precisely chargeable in part to the fact that they have not achieved that ideal. However, it would seem proper to designate them "sciences," since both subjects attempt to establish their propositions in accordance with the principles of scientific method, and thus to pass beyond the realm of mere opinion. We cannot all be *les chevaliers sans peur et sans reproche* but that does not necessarily mean that all who fall short of that ideal are evil men. The second objection, that a formally complete science allows no place for new discoveries, involves a misunderstanding of the conception. No science known to man, including mathematics, is formally complete in the sense that we are certain that its postulates are self-consistent and will never lead to a contradiction. However, with the postulate sets with which the various sciences are now operating, new propositions are constantly being devised. They are new in the sense that no one had thought of them before, and, when once formulated, they are seen to be related to the initial set of postulates. This is almost an everyday occurrence in mathematics, and is simply illustrated by the game of chess. The rules of chess are few, but the games, notwithstanding their continual novelty, are all deducible from them. However, some day a game may occur, played in strict accordance with the rules, but which presents a contradictory situation, e.g., the impossibility of completing the game. In that case the rules would have to be revised or chess itself abandoned. This also is the normal procedure of science, particularly in the empirical field. Hypotheses are formulated to account for particular conditions, further observations show the need for a correction in the hypotheses, and they are corrected accordingly. It is difficult to understand why such corrections in the initial postulates make the "science" any the less a "science." That process in fact has been customarily regarded as having the opposite result.

For the hypothetico-deductive idea of science, Professor Kaufmann proposes to

substitute a conception of science in terms of rules of procedure. He distinguishes between the *structure* of a science, i.e., its rules of procedure, and its *corpus*, i.e., the set of propositions accepted at a given time in accordance with the rules of procedure of the science. When a scientist changes the corpus of a science, either by incorporating new propositions or eliminating old ones he makes a *scientific decision*. The rules of procedure state the conditions which must be satisfied before a change in the corpus is permissible. This is the heart of Professor Kaufmann's doctrine, and he devotes many pages to a consideration of the logical status of the rules of procedure. About one-half the volume is concerned with various methodological issues in the social sciences as seen from the point of view of Professor Kaufmann's conception of science.

Professor Kaufmann's analysis of a relatively neglected aspect of scientific method has merit, but his repudiation of the traditional conception of the subject is unnecessary. Little work of value has been done in the formal analysis of the rules of scientific procedure. Professor Kaufmann's volume is an attempt to isolate the logical elements in that process. If his results seem to amount to no more than truisms, they are nevertheless necessary as part of a complete understanding of methodology. He has unfortunately been content to leave his analysis at the descriptive level. Thus, most if not all of his results are of the kind "there are three different types of correct scientific decision in a science S concerning a given proposition p: p is incorporated into S; p is eliminated from S without being replaced by an incompatible proposition; or p is eliminated and replaced by a proposition incompatible with it." Statements of this sort have the virtue of generality, but it is a generality of a kind different from that exhibited by modern logic. They are nothing more than descriptions, and differ from the fruitful concepts of contemporary logic, such as that of the propositional function, in that no general propositions of significance are derivable from them. That is to say, it is a generality without power. Furthermore, Professor Kaufmann's analysis is not inconsistent with the traditional view of the domain of scientific methodology which occupies itself with the problems of perception, discovery, explanation, verification, hypotheses, and so on. It is supplementary to that view and perhaps even a necessary prolegomenon to it. But to regard the problems of methodology, as Professor Kaufmann apparently does, as exhaustible through the logical analysis of procedural rules of the kind with which he is concerned is to maintain a position which is clearly untenable.

HUNTINGTON CAIRNS*

The Selection and Tenure of Judges. By Evan Haynes. Washington: National Conference of Judicial Councils, 1944. Pp. xix, 308.

This work is the fifth in the noteworthy Judicial Administration Series published by the National Conference of Judicial Councils for the purpose of promoting a more efficient judicial system. Previous volumes have dealt with court organization, appeals in criminal and civil cases, and traffic courts. The present volume turns to a problem basic in judicial administration, the selection and tenure of judges.

The book is of course primarily concerned with the American situation, and some sixty pages are devoted to summaries of federal and state constitutional and statutory

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provisions on selection and tenure of judges, together with an analysis of the changes that have been made in those methods during our history. But for comparative and background purposes Haynes has included also an interesting chapter on judges under the Stuarts, and two more directly relevant chapters on the contemporary English judges and on the methods of judicial selection in France, Italy, Germany, Canada, Latin America, and the Scandinavian countries.

The effect of this valuable comparative material is to emphasize the oddity of the practice of electing judges which most of our states embraced during the period from 1830 to 1850. The author gives a chapter to an examination of the "democratic revolution" which brought the elected judge onto the American scene. His conclusion is that the change to election was not a result of rational analysis of the needs of the judicial system, but was a by-product of "the ideas and impulses of a violent swing toward the democratization of government generally. The more mature and seasoned countries of Europe, who experienced the same revolution in government, preserved the idea that judges should be competently selected, and free of political pressure; but in America, the ebullient enthusiasm and intemperance of youth and inexperience carried all before it."

It is not necessary, of course, to go to other countries for data on elective versus appointive systems, since our own federal judiciary supplies the best possible comparison on this point. Haynes takes fully into account the weaknesses that have developed in the system of appointed federal judges, who at the district level at least have become senatorial patronage. And he is fully aware how frankly political the Supreme Court was in its earlier days. But with all its defects, he has no hesitation in concluding that the federal judiciary constitutes a better body of judges than those of any state.

Because the election of judges was originally supported on the ground that it would give more democratic results and bring the judges closer to the people, Haynes devotes a separate chapter to the question whether elected judges with short terms are more "liberal" than appointed judges with secure tenure. The method he uses in making this difficult comparison is to show a considerable number of instances in which the United States Supreme Court upheld the constitutionality of advanced social and economic legislation while state courts with elected judges were ruling against the same or similar laws. Probably an equal number of instances could be discovered where state courts were ahead of the Supreme Court, but in any case the evidence would seem to suggest that the method of selection has little relevance to the conservatism or liberalism of the judges selected.

The closing chapter of the book presents a classification of various methods that have been proposed to improve the operation of both the appointive and the elective systems. Particular attention is given to proposals aimed at having some person or body name several candidates from among whom some other person or body must select one. The author gives over sixty pages of references to law review articles or other sources in which selection proposals of various types have been discussed. The book should serve as an invaluable source of information, and as a stimulus to increased efforts toward reform of an institution in which Americans can take little pride of authorship, the elected judge.

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Airports and the Courts. By Charles S. Rhyne. Washington: National Institute of Municipal Law Officers, 1944. Pp. viii, 222. $5.00.

This little volume, prepared by the counsel of the National Institute of Municipal Law Officers, will be of great use not only to city and county officers and employees but also to legislators, federal and state commissioners of aviation, and lawyers for airlines, and for the public in general. It covers Airport Acquisition, including Condemnation; Airport Leases; Airport Regulation; Taxation of Airports; Airspace Rights of Aviators and Landowners; and Airport Approach Protection, including Zoning. Not only is there a brief digest of relevant case law, but also reference to, and discussion of, many state statutes, textbooks, and law-review articles. The arguments on various problems are presented clearly and with skill. In a very short time one is enabled to obtain a bird's-eye view of the present stage of the development of the state and municipal law affecting the establishment and operation of airports. There is no attempt to discuss the federal statute and the regulations issued under it, which are exceedingly important. No city, county, or state can take intelligent action regarding an airport problem without knowing what Congress or the Civil Aeronautics Board has done. The omission of federal material is hard to explain, unless considerations of space and size were controlling.

Pending proposals in Congress for federal aid in the extensive development of an airport program after the war make it probable that a new edition of Mr. Rhyne's valuable book will soon be needed. Perhaps it would be desirable to include in a second edition copies of the various model bills which have been prepared with regard to aeronautics, particularly those which relate to airports and zoning.

The profession is indebted to Mr. Rhyne and the Institute for this practical and able discussion of a rapidly developing legal topic.

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